United States Can Company, a wholly owned subsidiary of Inter-American Packaging, Inc. ***and*** **United Steelworkers of America, AFL–CIO and U.S. Can Pension Plan, Party-in-Interest.** Case 13–CA–27510

April 30, 1999

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On May 5, 1998, Administrative Law Judge George Alemán issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party Union filed answering briefs. The Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified below.

We find merit in the Respondent's exceptions to the judge's award of backpay to Helen Rae for the entire first quarters of 1989, 1990, and 1991. Rae testified that she was on vacation and, thus, not looking for work during January and February of these years. Although accrued vacation benefits are normally included in a backpay award, see *Continental Insurance*, 289 NLRB 579 (1988), Rae, by reason of her 25 years of employment with the Respondent, was contractually entitled to no more than 5 weeks of paid vacation annually. The judge erred by awarding vacation backpay to Rae in excess of 5 weeks for the yearly first quarters in dispute. In accordance with the foregoing, we shall remand to the Regional Director for recomputation of the backpay amount to be awarded Rae.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United States Can Company, a Wholly Owned Subsidiary of Inter-American Packaging, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts opposite their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

J.G. Battles	$3,362
Alex Baugh	90,489
Robert Bennett	92,876
Jack Boone	3,644
Alan Byers	94,613
Patsy Camardo	85,299
Willie Conner	18,256
Joseph Dauenhauer	3,602
Anthony Eardley	52,961
Earnest Finn	62,710
Dorothy Flowers	24,972
Trueman Goodwin	2,040
Louise Harris	30,190
Calvin Hart	55,323
John Hatfield	79,471
Frances Hawkins	49,524
Thomas Husul	55,062
Boleslaw (Bill) Kmic	24,294
Eddie Lewis	82,230
Carl Menhennet	47,004
John Misiora	66,820
Gerald Owens	37,540
Mable Pearson	94,328
Eugene Peretti	93,336
John Pfeil	14,036
Earnest Powe	69,767
Carl Smith	2,962
John Wallace	41,596
TOTAL BACKPAY	$1,378,307

In addition to the above amount, the Respondent shall also make whole Helen Rae by paying her $117,436, minus the excess amount of vacation pay that is determined in compliance to have been improperly awarded to her.

MEMBER HURTGEN, concurring in part, dissenting in part.

In the underlying decision, the Board and court found that the Respondent violated Section 8(a)(5) by repudiating the contractual Interplant Job Opportunity Program under which laid off employees were afforded the right to transfer to the Respondent's other facilities.[1] In this compliance proceeding, the judge found that each discriminatee would have transferred to other facilities if afforded the chance to do so. The judge based this conclusion on the fact that the Respondent failed to show that any of the discriminatees would have declined an offer of transfer. I find that this constitutes an improper

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are correct. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In accord with Board and judicial precedent cited and fully discussed in the judge's decision, we affirm the judge's conclusion that the Respondent is not entitled to an offset for retirement benefits and supplemental unemployment benefits paid to discriminatees during the backpay period. Although funded as part of the benefits earned by employees, the trusts are, as the judge correctly found, separate and distinct entities from the Respondent. The dissent would effectively overrule the precedent cited by the judge. We decline to do so.

[1] 305 NLRB 1127 (1992), enfd. 984 F.2d 864 (7th Cir. 1993).

apportionment of evidentiary burdens. The employees are the ones who have knowledge of personal circumstances which would cause them to accept or decline an offer. Thus, the burden of producing evidence should be on them (and the General Counsel who litigates on their behalf). However, in this case, I find that the judge's misapplication of the burden is not fatal. That is, in this case, and consistent with my view, there was employee testimony on the point. And, the judge credited the employees' testimony that each would have accepted transfers to designated facilities if offered. Thus, I find sufficient record evidence to uphold the judge's findings.

Next, I disagree with the judge's failure to offset, from his backpay calculations, certain benefits that the discriminatees received during the backpay period. In assessing backpay, the judge concluded that the Respondent was not entitled to an offset for retirement benefits and supplemental unemployment benefit (SUB) payments that the discriminatees received during the backpay period. Relying on *F & W Oldsmobile, Inc.*, 272 NLRB 1150 (1984), the judge found that such payments should not be offset because they constituted vested benefits, in the nature of delayed compensation, that were nondeductible collateral benefits.

My colleagues agree with the judge. I do not agree. I find that the pension and SUB payments received by the discriminatees should be deducted from the moneys Respondent owes them. The pension and SUB payments are benefits that are to be paid to employees when they are not earning wages from Respondent. However, in the instant case, the employees are receiving wages from Respondent, in the form of backpay. Thus, to pay them these benefits and backpay is contrary to the very purpose of these benefits. Further, to pay the employees both the benefits and backpay is to grant them a windfall. They wind up with more money than they would have received if there had been no unfair labor practices. The purpose of a Board remedy is to compensate employees for losses attributable to an unfair labor practice, not to place employees in a better position.

The case is distinguishable from *NLRB v. Gullett Gin*, 340 U.S. 361 (1951). That case involved benefits that were part of a governmental plan (e.g., state unemployment compensation). The Court was careful to note that the benefit payments were "not made to the employees by respondent but by the state out of state funds derived from taxation." *NLRB v. Gullett Gin*, supra. Similarly, the Court said that such payments are "not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state." Id.

Here, conversely, the vested benefits at issue are not part of a governmental program that is broadly applicable to employees generally and aimed at addressing a general "policy of social betterment." Rather, the pension and SUB payments came from employer-sponsored private benefit programs. These benefit programs, which inure solely to the benefit of the Respondent's employees, are sponsored and funded by Respondent, and the Respondent is responsible for administering the payments to its employees. Thus, there are no overriding social policy considerations that support the discriminatees' retention of these payments. To the contrary, the relevant "policy" consideration is that the discriminatees should not receive a double-recovery windfall.[2]

In all other respects, I agree with the judge.

Richard S. Andrews and *Daniel E. Murphy, Esqs*., for the General Counsel.
Condon A. McGlothen and *Rody P. Biggert, Esqs. (Seyfarth, Shaw, Fairweather & Geraldson),* for the Respondent.
William H. Schmelling, Esq., for the Charging Party.
Larry Goldstein, Esq., (Ross & Hardies), for the Party-in-Interest.

SUPPLEMENTAL DECISION

GEORGE ALEMÁN, Administrative Law Judge. On January 15, 1992, the National Labor Relations Board (the Board) issued a decision in this matter finding, inter alia, that the Respondent, United States Can Company, a Wholly Owned Subsidiary of Inter-American Packaging, Inc., had adopted the 1986–1989 Master (collective-bargaining) Agreement, received into evidence as Respondent's Exhibit 4 (R. Exh. 4),[1] between its predecessor Continental Can Company, and United Steelworkers of America, AFL–CIO–CLC (the Union), when it acquired Continental Can's four-plant general packaging division,[2] and that, having done so, it violated Section 8(a)(5) of the Act by unilaterally discontinuing the Interplant Job Opportunity Program (IPJO) contained in article 29 of that agreement, which program generally afforded unit employees laid off due to, inter alia, a plant closure, the right to transfer to one of its

[2] In *F & W Oldsmobile*, supra, the judge, affirmed by the Board, spoke generically of benefits, without distinguishing between governmental and private benefits. Indeed, it does not appear from the decision in that case that the distinction was even argued. Since the distinction *is* made by the Supreme Court in *Gullett*, I shall follow the Court's teaching and not that of *F & W*.

Contrary to my colleagues, the significant fact is not that the trusts herein are "separate and distinct entities from the Respondent," but rather that the benefits herein are private and are not part of a system of governmental benefits for the general welfare.

[1] References herein to exhibits are identified as follows: (GCX) for a General Counsel exhibit; (RX) for a Respondent exhibit; (CPX) for a Charging Party exhibit; and (JX) for a joint exhibit. U.S. Can Pension Plan offered no exhibits into evidence. Record testimony is identified by the transcript volume number shown by Roman numerals, e.g., I;II;III:IV:V; followed by the page(s) number. Attachments to the Compliance Specification (GCX-1[c]) showing each discriminatees' gross and net backpay computations are identified simply by the word "Attachment" followed by the appropriate number.

[2] The Acquisition Agreement was admitted into evidence as RX 4. The plants acquired by Respondent are a Burns Harbor, Indiana facility (Burns Harbor), a Derry, New Hampshire facility (Derry), a Passaic, New Jersey facility (Passaic), and a Clearing/North Grand facility in Chicago, Illinois (Clearing/North Grand). While actually two separate plants, the Clearing/North Grand facility had operated out of one building. The record reflects that the North Grand plant closed on December 30, 1987, the Clearing plant on February 10, 1989, the Passaic plant on September 16, 1988, and the Derry plant on June 28, 1991 (JX-1).

other facilities.[3] See *United States Can Co*., 305 NLRB 1127 (1992). To remedy this violation, the Board directed that Respondent:

> Rescind the unilateral discontinuance of IPJO, take actions consistent with Article 29 of the 1986–1989 Master Agreement to apply that program to eligible applicants, and make the unit employees whole for any losses they may have suffered because of Respondent's discontinuance of IPJO, with interest. . . .

The Board's decision was subsequently enforced by a U.S. court of appeals. See 984 F.2d 864 (7th Cir. 1993).

On June 6, 1995, the Regional Director for Region 13 issued a Compliance specification and notice of hearing, and caused it to be served on Respondent and the Party-in-Interest,[4] identifying 32 individuals as discriminatees eligible for relief under the terms of the Board's Order, and alleging that a controversy exists as to the amount of backpay due them, requiring that a hearing be held to resolve these issues.[5] The specification, as amended at a supplemental hearing held in this matter, identifies 32 individuals as eligible for some form of relief, e.g., backpay and/or pension credits and vacation pay, under the Board's Order.

Specifically, the specification alleges, at paragraph I, that the employees identified in the attachments became discriminatees when the Respondent announced it was closing its Clearing/North Grand, Passaic, and Derry facilities. Except for Lewis and Finn (see discussion below), the backpay period for each discriminatee is alleged to begin on the date the Respondent hired a new hire representative into a position at its Passaic, Derry, or Burns Harbor, facility to which the more senior discriminatee could have transferred under the IPJO program had Respondent not unlawfully terminated the program, and to end when the position to which the discriminatee would have transferred "terminates, and no other position at that plant becomes available, when the plant they transferred to closed and their seniority as an IPJO transferee was insufficient to allow them to transfer to a new position in another plant or when they would have retired." The gross backpay amounts for the discriminatees was determined by imputing to them the quarterly earnings of the new hire representatives. The duration of the backpay period for each discriminatee varies, with the earliest backpay period alleged to have begun in the third quarter of 1987 (see attachment 26 for discriminatee John Wallace), and the latest to have ended in the first quarter of 1993 (see attachment 20 for discriminatee Mabel Pearson).

The Respondent filed a verified answer to the specification on May 7, 1996, and an amended verified answer on August 19, 1996. The Party-in-Interest also filed an answer which mirrored that filed by Respondent. At the close of the hearing, the Respondent was granted leave to further amend, within 10 days, its answer to respond to certain amendments made to the specification by the General Counsel during the course of the hearing.[6] An amended answer was in fact received by me on October 11, 1996, and has been made part of the record as RX 159.

Respondent's answer, as amended, admits some and denies other allegations in the specification. It admits, for example, paragraph X of the specification which alleges that vacation pay is owed to discriminatees Jack Boone, Joseph Dauenhauer, Trueman Goodwin, Eddie Lewis, Carl Smith, Alex Baugh, and Calvin Hart. It further admits that the specification correctly identified the new hire representatives whose positions are being imputed to discriminatees and that the quarterly gross earnings (listed in each attachment in the total gross backpay column) shown for the new hire representatives are accurate (I:57–58). Finally, it admits that to the extent a discriminatee is found to be owed backpay, the individual would also be entitled to additional pension credits for that period (I:79–80).

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[3] More specifically, the IPJO Program (RX-12, p. 86) states, in relevant part, that:

> An employee under this Agreement on layoff from a plant at which the Company has announced a permanent plant closing or an employee continuously on layoff for 30 days or more and who had 2 or more years of seniority on the date of layoff and who is not eligible for an immediate pension and social security shall be given priority over other applicants (new hires, including probationary employees) for job vacancies . . . at other plants of the Company . . . .

[4] The U.S. Can Pension Plan was named as a Party-in-Interest because of the assertion in the specification that the Respondent was liable to the discriminatees for additional pension credits. While counsel for the Party-in-Interest was in attendance on the morning of the first day of the hearing, he remained absent throughout the remainder of the hearing, and made only a brief cameo appearance just prior to the close of hearing.

[5] The specification (GCX-1[c]) contains 33 separate attachments each labeled Attachment 1, 2, 3, etc., identifying the quarterly gross earnings being imputed to a particular discriminatee by way of a new hire representative, e.g., an employee who was hired to fill a vacancy that would have gone to a discriminatee under the IPJO program, the discriminatee's interim earnings, and the net backpay amount owed. Discriminatee Eddie Lewis has two separate attachments reflecting regular backpay (Attachment 14) and vacation pay (Attachment 32) owed him. While initially asserting that the use of calendar quarters was proper, the Respondent has abandoned this argument (RB:97).

The General Counsel amended the specification at the start of the hearing to correct inaccuracies in certain of the appended attachments (see GCX-2). The specification was amended as follows: (1) Attachment 7 belonging to discriminatee Earnest Finn and Attachment 14 belonging to Lewis were amended to reflect that their backpay begins to run on the date they were laid off, respectively on December 11 and October 26, 1987, and not on the dates their assigned new hire representatives, T. Gizzi and G. Catalino, were hired respectively on November 11, and October 5, 1987; (2) Attachments 15, 19, and 25 belonging to discriminatees Dwight McLaurin, James Paul, and Smith Teemer, none of whom are alleged to be owed any backpay for having removed themselves from the labor market and who consequently were not assigned to any new hire representative positions, were amended to include such assignments; (3) Attachment 11 belonging to discriminatee Frances Hawkins was amended to correct an inadvertent reference to the wrong calendar quarters; (4) Attachments 5, 21, and 27 reflecting backpay computations for discriminatees Willie Conner, Eugene Peretti, and Alex Baugh were amended to reflect that the latter three had additional interim earnings which reduced the overall amount of backpay due them.

[6] Just prior to the close of hearing, Respondent's counsel sought to submit an amended answer on behalf of the Party-in-Interest. I declined to accept it. In so doing, I took note of the fact that despite having appeared briefly at the hearing just prior to its closure, counsel for the Party-in-Interest, Larry Goldstein, made no attempt to offer the document himself on behalf of his client, and of Respondent's counsel's own representation that in proffering the amended answer he was not acting as agent for the Party-in-Interest. In these circumstances, and as no explanation was proffered by the Party-in-Interest for seeking to amend its answer, Respondent's request that the document be received in evidence. I further declined to have the document placed in a rejected exhibit file as the Party-in-Interest had made no such request.

The Respondent, however, disputes that the new hire representatives' earnings are properly imputable as gross backpay to the discriminatees because the General Counsel (1) failed to take into account whether the discriminatees would have transferred to new facilities had the IPJO program remained in effect ("propensity to transfer" defense);[7] and (2) failed to assign discriminatees to the correct vacancies. It further argues that the gross backpay figures are, in any event, incorrect because they do not toll backpay for the period before October 1988, when the Union filed a charge regarding the elimination of IPJO, and after 1992, when the IPJO program was reinstated (the "bookend" defense). The Respondent also contends that most of the named discriminatees are not entitled to any backpay award because at the time of their layoffs, they qualified for an immediate pension, rendering them ineligible for a transfer under IPJO (the "pension eligibility" defense). It further argues that most discriminatees, in any event, failed to mitigate their damages. Finally, the Respondent claims that to the extent the discriminatees are found eligible for backpay, the amounts of Supplemental Unemployment Benefits (SUB) and pension benefits received by them during their backpay periods must be offset against any backpay to which they might be entitled.[8]

A hearing in the matter, as noted, was held before me in Chicago, Illinois between September 9 and 27, 1996, during which all parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. On the basis of the entire record, including my observation of the demeanor of the witnesses, and having duly considered posthearing briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

[7] The Respondent had initially disputed the General Counsel's methodology for identifying discriminatees, claiming that only those employees who would have applied for an IPJO transfer but for its discontinuance of the program can be considered discriminatees. The General Counsel moved to strike Respondent's answer in this regard. At the hearing, the Respondent withdrew its opposition to the General Counsel's methodology by stating that the question of whether or not an employee would have had to apply for an IPJO transfer to be considered a discriminatee was no longer an issue (I:26).

[8] The Respondent established a SUB fund on September 25, 1987, pursuant to its Acquisition Agreement with Continental Can Co. (See RX-138; RX-119, p. 80), and in accordance with the provisions of the Employment Retirement Income Security Act (ERISA). The SUB plan was modeled after one that was in effect between Continental Can and the Union (GCX-8, pp. 4–1, et. seq.). Under the SUB plan, employees with at least 2 years tenure who were laid off due to plant closure were guaranteed SUB pay equaling 70 percent of their straight time earnings for at least 1 year. The SUB and pension trusts both were funded exclusively by the Respondent.

The Respondent also raised certain affirmative defenses in its answer, including a claim that the General Counsel's delay in seeking compliance with the Board's underlying order should preclude any recovery under the "laches" doctrine, as well as an assertion that the General Counsel's use of forms other than the standard NLRB forms to ascertain the discriminatees' job search activities warrants a denial of backpay. The "laches" defense was withdrawn at the hearing by joint stipulation of the parties (JX-1, p. 4). Respondent's "incorrect forms" defense was rejected at the hearing as not constituting grounds for denying backpay to the discriminatees (I:106–109).

I. ANALYSIS AND FINDINGS

A. Applicable Legal Principles

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed, and that in a compliance proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due, that is the amounts the employees would have received but for the employer's unlawful conduct. *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 178 (2d Cir. 1975); *Basin Frozen Foods*, 320 NLRB 1072, 1074 (1996). In determining the appropriate formula for arriving at gross backpay figures, the Board is vested with a substantial degree of discretion inasmuch as it is impossible to arrive at precise figures because the discriminatees were not employed during the backpay period. *Canterbury Educational Services*, 316 NLRB 253, 254 (1995), citing *NLRB v. Brown & Root*, 311 F.2d 447 (8th Cir. 1963). Any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. *La Favorita, Inc.*, 313 NLRB 902 (1994). When a respondent disputes the accuracy of the gross backpay figures in a compliance specification or the premises upon which they are based, it must in its answer "specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate figures." A failure to adequately explain its denial of matters over which it is presumed to have knowledge shall result in the allegation in question being deemed admitted as true, and will preclude a respondent from presenting evidence to refute said allegation. See Rule 102.56(b) and (c) of the Board's Rules and Regulations.

Once the gross backpay amounts are established, the burden shifts to the employer to establish facts that would negate or mitigate its liability. *NLRB v. Mastro Plastics*, 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). In short, the burden is on the employer to show, through a preponderance of credible evidence, *Browning Industries*, 221 NLRB 949, 951 (1975), that no backpay is owed or that what is alleged to be owed should be diminished because the discriminatee was unavailable for work, or neglected to make reasonable efforts to find interim work. *Inland Empire Meat Co*., 255 NLRB 1306, 1308 (1981), enfd. mem. 692 F.2d 764 (9th Cir. 1982). It should be noted, however, that a backpay claimant is not held to the highest standard of diligence in seeking interim employment, but is only required to have made reasonable exertions. Thus, an employer does not satisfy its burden showing that no mitigation took place because the claimant was unsuccessful in obtaining interim employment, by showing an absence of a job application by the claimant during a particular quarter or quarters of a backpay period, or by showing the claimant failed to follow certain practices in his job search, e.g., reading and responding to job advertisements in newspapers. *S.E. Nichols of Ohio*, 258 NLRB 1, 11 (1984). Finally, any uncertainties or ambiguities must be resolved against the wrongdoer whose conduct made such doubts possible. *Teamsters Local 469 (Coastal Tank Lines)*, 323 NLRB 210 (1997). With these principles in mind, I now address the issues at hand.

B. The Gross Backpay Issues

1. The identification of discriminatees

The Respondent, in its first amended answer, initially disputed the General Counsel's claim that employees became

discriminatees when the plant closings were announced, arguing instead that employees became discriminatees "only if, but for Respondent's elimination of IPJO, they would have applied for an IPJO transfer in accordance with Article 29 following the [plant closing announcements], would have been eligible for such transfer, and would have accepted such transfer if offered by Respondent." It claimed that without such a determination first being made, the backpay amounts attributed to the discriminatees remained speculative, premised on nothing more than the word of the discriminatees that they would have accepted a transfer under the IPJO program to one of its other facilities in another state.

In a motion to preclude (GCX-1[ii]), the General Counsel moved to strike Respondent's above alternative method for selecting discriminatees on grounds that the Respondent was attempting to relitigate matters decided by the Board and the court in their respective decisions, and because Respondent's answer in this regard failed to comply with Section 102.56(b) and (c) of the Board's Rules and Regulations by not "setting forth with specificity its methodology as to the particulars of the selection process" (GCX-1[ii]). At the hearing, the Respondent withdrew its opposition to the General Counsel's methodology for selecting discriminatees, stating that the question of whether or not employees would have had to apply for a job to become discriminatees was no longer an issue (Tr. 26). In light of its changed position, I find that the individuals named in the specification were indeed properly identified as, and are, discriminatees eligible for relief under the terms of the Board's order.[9]

2. The "propensity to transfer" defense

Having withdrawn its objection to the General Counsel's methodology for identifying discriminatees, the Respondent nevertheless contends that the General Counsel erred in imputing gross backpay to the discriminatees because the former did not establish that the discriminatees would have accepted an IPJO transfer following their layoff had it been offered to them. Essentially, the Respondent's argument is that the General Counsel was required to prove, as part of its burden of establishing the discriminatees' gross backpay, that the discriminatees would have transferred to one of its other facilities following their layoff had the IPJO program still been in effect. It avers that because no such showing was made here, the gross backpay amounts shown in the specification for each discriminatee are speculative, requiring dismissal of the Specification as a matter of law (RB:3, fn. 3).

The Respondent apparently misunderstands the manner in which the burdens of proof are allocated in a compliance proceeding. In such a proceeding, the General Counsel's sole burden, as previously state, is to show the gross amounts of backpay due to a discriminatee, that is the amount an individual would have received but for the employer's illegal conduct, La Favorita, supra, a burden that is generally satisfied through the issuance of a compliance specification supported by appropriate documentation, such as backpay and other records, showing the amounts of gross backpay being attributed to discriminatees. *Lundy Packing Co*., 286 NLRB 141, 148 (1987). The General Counsel here has clearly done so. Thus, as found above, the individuals named in the specification were properly identified as discriminatees eligible for relief under the Board's Order. Further, the Respondent stipulated that the new hire representatives were properly identified by the General Counsel, and that their gross earnings as shown in the specification are accurate (although it disagrees that the amounts can be imputed to the discriminatees). Having properly identified the discriminatees and the amounts of gross backpay they would have earned had they been afforded the opportunity to transfer to the positions filled by the new hire representative employees, the General Counsel has therefore satisfied his burden of proof, and I so find.

At this point in a compliance proceeding, the burden, as stated previously, shifts to the Respondent to affirmatively establish by a preponderance of the evidence that the discriminatees are not eligible for backpay. *Castaways Management*, 308 NLRB 261, 262 (1992), citing to *NLRB v. Moone Aircraft Corp.*, 366 F.2d 809 (5th Cir. 1966). Thus, it is the Respondent, not the General Counsel, which must produce facts to show that no backpay is owed because the discriminatees would not have transferred, or because they failed to mitigate their damages. In this regard, the Respondent cannot merely rely on its cross-examination of discriminatees and their alleged impeaching testimony to satisfy its burden of proof. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 324 NLRB 630 fn. 3 (1997), citing *NLRB v. Inland Empire Meat Co*., 692 F.2d 764 (9th Cir. 1982).

Notwithstanding the above principles, the Respondent, as more fully discussed below, has for the most part relied on its cross-examination and purported impeachment of the discriminatees to support its lack of "propensity" and "failure to mitigate" defenses. The Respondent also relied heavily on testimony provided by Dr. David Evans, a labor economist, who was called by Respondent as an expert witness. I was not favorably impressed by Dr. Evans' testimonial demeanor. Thus, while seemingly cool and collect on his direct examination by Respondent's counsel, he became perturbed during cross-examination by the General Counsel, and became somewhat defensive and at times argumentative when the underpinnings for his conclusions were being challenged by the General Counsel. At times, I observed that Evans seemed to delay his responses to some of the General Counsel's questions and would look towards Respondent counsel's table, seemingly in anticipation of or hoping to provoke an objection from Respondent's counsel. Overall, Evans struck me as a biased witness whose testimony is entitled to little or no weight.

But even if viewed as wholly objective, Evans' testimony would be of little or no value on the propensity issue, for it amounts to nothing than a general assumption as to what factors he perceives could have served as inducements for the laid off discriminatees not to want to transfer. Thus, he testified that the SUB and unemployment benefits that discriminatees began receiving soon after being laid off, totaling 70 percent of

[9] Respondent's objection to the method used by the General Counsel to identify discriminatees would in any event have been rejected under Sec. 102.56 of the Board's Rules and Regulations. Thus, it was not enough for Respondent to simply object to the General Counsel's method of arriving at the gross backpay figures. Rather, under Sec. 102.56, Respondent was required to come forth with the names of employees it believes would have qualified as discriminatees, and the amounts of gross backpay they would be entitled to, under its own alternative theory. It has done neither. Nor was any explanation proffered as to how it might have gone about identifying such employees. In the absence of any alternative calculations of its own, the Respondent's general denial of the accuracy of gross backpay calculations contained in the specification does not suffice under Sec. 102.56(b) of the Board's Rules to put those calculations in issue.

their former salary, which in most cases was followed a year later by pension benefits, were strong disincentives for discriminatees to move themselves and possibly their families to some other state to take an IPJO job at one of Respondent's remaining facilities (XIII:2596). Evans, however, never personally met, or so much as interviewed, any of the discriminatees. Thus, his assumption are premised not on what the discriminatees actually did, but rather on what a reasonable person might have done when faced with the option of staying home and continuing to receive SUB and other benefits, or giving up such benefits and relocating to some other state to take an IPJO job. Such an assumption, however, is based on nothing more than speculation and does not serve as evidence that any one or all of the discriminatees would have reacted as suggested by Evans, or as grounds for denying the discriminatees the backpay that is alleged to be owed them.

Other than Evans' rejected testimony, the only other evidence on the question of whether the discriminatees would have transferred to other facilities came from the discriminatees themselves, all of whom, after testifying they would have done so, were subjected to extensive cross-examination by Respondent. The Respondent was given great latitude in this regard. Thus, it questioned discriminatees on a variety of extraneous matters such as whether they had school-aged children, whether their spouse was employed and enjoyed his or her job, whether the spouse was too ill to travel, whether the discriminatee had other relatives living in the area, whether the discriminatee knew where the other facilities were located, where the discriminatee was born and got married, etc., all in an effort to impeach their claims that they would have taken IPJO transfers to other facilities following their layoffs. The Respondent had little or no success in this regard, for all discriminatees remained steadfast in their assertions that they indeed would have transferred despite any roots they may have had in their respective communities or family situations.

The Respondent would have me reject such claims by the discriminatees on grounds that it is simply not credible to believe they would have done so, citing to Evans' expert testimony in this regard. However, Evans' general views on what might have caused a discriminatee not to want to transfer is, as found above, not probative of whether any or all of these particular discriminatees would in fact have accepted an IPJO transfer had it been made available to them. Further, that Respondent finds the discriminatees' claims in this regard to be unreasonable or incredible is of no consequence, for its burden is one of producing evidence sufficient to show that the discriminatees would not have transferred. Suspicion and surmise, the Board has long held, are no more valid bases for a decision in a backpay hearing than in an unfair labor practice hearing. *Laidlaw Corp.*, 207 NLRB 591, 594 1973), 507 F.2d 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1975). In the absence of such evidence, and given my findings below as to the credibility of each discriminatee, I conclude that the Respondent has not satisfied its burden of showing that any or none of the discriminatees would have accepted a transfer to the facility imputed to them in the specification.

3. The "slotting" of discriminatees into new hire representative positions

The Respondent further attacks the reliability of the gross backpay calculations by claiming that the General Counsel wrongly ascribed to discriminatees Finn and Lewis the vacancies filled by new hire representatives Gizzi and Catalino, who were hired before the former two were laid off. It claims that the IPJO provisions do not permit an otherwise eligible IPJO transferee to "bump" into a position that was filled by a new hire before the transferee was laid off. Consequently, it argues that neither Lewis nor Finn was capable under IPJO of bumping into Catalino's or Gizzi's position and could only have been slotted into vacancies that became available on or after they were laid off (RB:98). It further contends that the General Counsel erred in not ascribing any vacancies/new hire representative positions to discriminatees McLaurin, Paul, and Teemer.

According to Respondent, the General Counsel's failure to pair off Lewis and Finn with the correct new hire representatives, and to properly assign vacancies/new hire representatives to McLaurin, Paul, and Smith renders inaccurate all the gross backpay calculations in the specification. By way of explanation, it states that once the Catalino and Gizzi vacancies are properly removed from the backpay equation, Lewis and Finn must be reslotted based on their seniority to new hire representative positions which the specification has already assigned to other less senior discriminatees, and that Paul, given his seniority, must be assigned to the position filled by new hire representative M. Bujold, which it claims was improperly imputed to discriminatee Calvin Hart. The Respondent contends that the reslotting of Lewis, Finn, and Paul into what it avers are the proper vacancies/new hire representative positions creates a ripple effect in that those discriminatees who must properly be "bumped" by Lewis, Finn, and Paul from the vacancies assigned to them will then be required to "bump" into vacancies assigned to still other discriminatees, who would in turn bump others, and so on. These corrections, the Respondent points out, leads to gross and net backpay amounts different from those set forth in the Specification.[10]

[10] With its August 19, 1996, amended verified answer, the Respondent submitted an appendix B which purported to show the correct amounts of backpay to which the discriminatees would be entitled after the Catalino and Gizzi positions are removed from consideration, Lewis and Finn are reslotted, and all other discriminatees are "bumped" into their appropriate new hire positions. The Respondent's calculations omit any backpay for the pre-October 1988 and post-1992 period consistent with its position that backpay must be tolled for these periods. However, with its posthearing October 10, 1996, amended answer, the Respondent attached an appendix B-1 which, like the previous appendix B, was intended to show the correct amounts of backpay to which each discriminatee would be entitled after the above changes. Despite the fact that both schedules B and B-1 were premised on the same theory, e.g., the removal of the Catalino and Gizzi positions from any consideration, the reslotting of Lewis and Finn into other new hire representative positions, and the consequent "bumping" down of all other discriminatees, there are substantial differences between the two schedules. For one, the net backpay amounts shown for discriminatees in Schedule B are different from those attributed to them by Respondent in schedule B-1. Further, the new hire representative assigned by Respondent to some discriminatees in schedule B is not the same as that shown for them in schedule B-1 (compare, e.g., assignment of new hire representatives to discriminatees Flowers, Harris, Misiora, Pfeil, Owens, Husul, Menhennet, and Eardley in schedules B to B-1). These, and other differences between the two schedules, are not explained by the Respondent. It does appear, in any event, that the Respondent has disavowed any reliance on either Schedule B or Schedule B-1, for in its posthearing brief (RB:100-101) it has set forth yet another set of alternative backpay figures for discriminatees, and has reassigned some of them (e.g., Bennett, Peretti, Hart, Kmic, Paul, etc.) to new hire representatives different from those shown in schedules B and B-1. Given the unexplained inconsistencies between schedules B and B-1, and my finding, infra, that the Catalino and Gizzi positions had been properly

Initially, Respondent's claim that Lewis and Finn have been erroneously assigned to the Catalino and Gizzi vacancies not only lacks evidentiary support but is contradicted by the very IPJO provisions Respondent seeks to rely on. As noted, the only argument raised by Respondent with respect to Lewis and Finn is that under the provisions of IPJO neither Lewis nor Finn could have bumped Catalino or Gizzi because the former were laid off after the latter two were hired. The Respondent, however, has not pointed to the particular language in article 29 of the Master Agreement containing this restriction, nor have I found any in my review of article 29. In fact, a review of the IPJO and other pertinent provisions of the Master Agreement strongly supports the General Counsel's claim that Catalino and Gizzi could have been displaced by Lewis and Finn had the latter two been allowed to exercise their bumping rights under IPJO.

Section 29.110 of article 29, as previously indicated, gives employees laid off due to, inter alia, a plant closing "priority over other applicants (new hires, including probationary employees) for job vacancies . . . at other plants of the Company." Subsection 29.110(d) of Article 29 defines a vacancy as including "any job which is filled by a probationary employee." Article 12.3 of the Master Agreement states that employees are deemed probationary during the first 30 calendar days of employment, "but not less than 20 days during each of which some work was actually performed." Given the above provisions, it would appear, and the Respondent does not contend otherwise, that both Catalino and Gizzi may have been probationary employees when Lewis and Finn were laid off. As such, the IPJO provisions make clear that Lewis and Finn could have bumped Catalino and Gizzi, provided of course the former satisfied the seniority and other IPJO requirements. The Respondent here does not contend that Lewis and Finn could not have bumped Catalino and Gizzi due to a lack of seniority. Rather, its sole argument, which, as noted, it fails to support by reference to specific language in the IPJO provisions, is that IPJO precludes a laid off employee from bumping into a position that was filled by a new hire prior to the layoff. Accordingly, I find that the new hire representative positions held by Catalino and Gizzi were properly imputed to Lewis and Finn, respectively.[11]

4. The "bookend" defense

The Respondent contends that the gross backpay figures shown for certain discriminatees are incorrect because they include the periods before the Union filed a charge on October 4, 1988, alleging the discontinuance of the IPJO program to be unlawful, and after 1992, when the IPJO program was reinstated. I disagree. As to its latter claim, the Respondent produced no evidence to substantiate its claim that the IPJO program was in fact reinstated sometime in 1992. In the absence of such evidence, I need not address the question of whether the reinstitution of the IPJO program would have served to toll backpay. In any event, the Respondent's failure to renew this argument in its posthearing brief leads me to reasonably conclude that the argument has been withdrawn. Accordingly, Respondent's argument that backpay should be tolled for the period after 1992, is rejected.

The Respondent also claims that, as a matter of equity, backpay should be tolled for the period prior to October 1988, because the Union, despite knowing of the discontinuance of the IPJO program as early as September 1987, never filed a grievance over the issue. In this regard, it does not dispute that the Board in the underlying proceeding found that the Union's October 1988 charge related back to a charge filed in January 1988. However, it contends that the Union had an affirmative obligation to file a grievance over the discontinuance of the IPJO program when it presumably learned of it in September 1987, as it had on other matters during that period of time, and that having failed to do so the Union now bears responsibility "for the portion of the period that is attributable, at least in part," to its failure to act. I find no merit to Respondent's argument, for it constitutes, in my view, nothing more than an attempt by Respondent to use the cloak of equity to circumvent its obligation of making employees whole by shifting responsibility to the Union. The Respondent, not the Union, is the wrongdoer here, and the Union's failure to grieve the discontinuance of the IPJO program cannot obviate the Respondent's obligation to make whole those discriminatees who, but for Respondent's unlawful repudiation of the IPJO program in September 1987, would have remained in its employ receiving the wages and other benefits the specification now rightfully claims is owed to them. Moreover, given its position in the underlying hearing that it was not bound to the Master Agreement, it is not all that clear that Respondent would even have acknowledged the Union's right to grieve its discontinuance of the IPJO program. While it does indeed appear that Respondent allowed certain grievances to be processed against it, those involved contractual provisions to which the Respondent had stated it would adhere. See 305 NLRB at 1132. The IPJO program was not one of them. Thus, it may very well have been an act of futility for the Union to initiate a grievance against Respondent alleging the repudiation of the IPJO program as a contract violation. Accordingly, I find no merit to Respondent's argument that backpay should be equitably tolled for the period prior to October 1988.

5. The "pension eligibility" defense

In paragraph XIV of its answer (GCX-1[y], RX-158); the Respondent asserts that certain of the discriminatees are in fact not discriminatees at all because at the time they purportedly would have transferred, they were eligible for a pension and under the IPJO provisions were precluded from transferring (Tr. 69–70, 98). The Respondent has apparently abandoned this argument as it was not pursued in its posthearing brief. In any event, on its merits Respondent's argument lacks substance, for I find nothing in the IPJO language, nor did Respondent point to any, to suggest that mere eligibility for a pension would preclude an employee from obtaining an IPJO transfer. In fact, section 29.110 of article 29 makes clear that priority for transfer purposes is precluded only if the employee is eligible for both a pension *and* social security (RX-12, p. 86). Further, the language of Section 29.418 states that a laid-off employee

imputed to Lewis and Finn respectively, Respondent's alternative calculations as set forth in schedule B, schedule B-1, and in its posthearing brief, are rejected.

[11] The specification initially alleged that the backpay for Lewis and Finn begins on the date their new hire representatives were hired (GCX-1[c], Attachments 7 and 14). It was subsequently amended by the General Counsel at the hearing to reflect that backpay began running on the date Lewis and Finn were laid off, not on Catalino's and Gizzi's hire dates (GCX-2, amended attachments 7 and 14).

eligible for a "70/75" pension[12] who requests employment under IPJO "will be eligible for preferential employment. . . ." Such language lays bare Respondent's claim that eligibility for pension precludes a laid-off employee from exercising transfer rights under IPJO. In these circumstances, I find no merit to Respondent's claim that the individuals identified in paragraph XIV of its answer cannot be discriminatees because they may have been eligible to receive a pension.

C. The Claimed Offsets to Backpay

1. Pension and SUB payments

The record reflects that discriminatees received SUB payments for one year following their layoff after which they collected pension benefits either in the form of a lump sum payment or through monthly distributions. The Respondent contends that except for the lump sum payments, all pension and SUB benefits paid to discriminatees must be offset against any backpay to which the discriminatees may be entitled (RB:15). I disagree.[13]

As to the pension benefits received by discriminatees, the record reflects, and the Respondent does not dispute,[14] that at the time of their layoff, all the discriminatees were vested in, and therefore eligible for, one of the several pensions established under the pension trust agreement (GCX-8). In *F & W Oldsmobile, Inc.*, 272 NLRB 1150 (1984), the Board was asked to determine, inter alia, whether pension payments made to a discriminatee during a backpay period should be offset from the backpay owed to the discriminatee or whether they were collateral benefits not subject to an offset.[15] The Board found the latter to be true. In so doing, the Board observed that "a vested pension constitutes a contractual obligation to the employee" and that benefits paid to vested employees under such a pension plan are "in the nature of delayed compensation for former years of faithful service." It went on to hold that "a pension payment which is, in effect, 'delayed compensation' for earlier employment clearly does not constitute earnings of employees during the backpay period" but is instead a nondeductible "collateral benefit. " See also *Workroom for Designers*, 289 NLRB 1437, 1439 fn. 6 (1988).[16]

The Respondent would distinguish *F & W Oldsmobile* from the instant case, pointing out that in *F & W Oldsmobile*, the pension payment at issue was distributed in one lump sum, whereas here, the discriminatees received their pension benefits in monthly installments. While *F & W Oldsmobile* did involve a lump sum payment rather than, as here, monthly distributions, the distinction is one without substance, for I discern nothing in the *F & W Oldsmobile* decision to suggest that the Board's holding regarding the collateral nature of vested pension benefits applies only a lump sum distribution of such benefits and not to retirement benefits that may be disbursed in some other fashion, such as through monthly payments. The Board drew no such distinction in its decision, and I decline to do so here. Indeed, it would make very little sense to hold that only lump sum pension payments can be deemed to be collateral, for once the pension benefit has vested the beneficiary is contractually entitled to such accrued benefits regardless of how those benefits are ultimately distributed. Thus, whether paid out in one lump sum or through monthly distributions, pension benefits represent "delayed compensation" for earlier employment and, under the Board's holding in *F & W Oldsmobile*, remain a nondeductible collateral benefit.

The Respondent, nevertheless, contends that the amounts paid to discriminatees in pension benefits can hardly be deemed to be collateral because the monyes that fund the pension trust account come almost exclusively from its own "pocket." However, it is well settled that "[a]pplication of the collateral source rule depends less upon the source of funds than upon the character of the benefits received." *Haughton v. Blackships, Inc*., 462 F.2d 788, 790 (5th Cir. 1972). Thus, the mere fact that an employer contributes money, either by paying premiums, making contributions, etc., to the fund from which benefits are derived does not establish that the fund is not a collateral source. Id. Also *Blake v. Delaware* and *Hudson Railway Co.*, 484 F.2d 204, 206 (2d Cir. 1973); *Phillips v. Western Co., of North America*, 953 F.2d 929, 929 (5th Cir. 1992); *Molzof v. United States*, 6 F.3d 461, 465 (7th Cir. 1993); *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020 (9th Cir. 1993). As was more succinctly stated in *Folkestad v. Burlington Northern, Inc.,* 813 F.2d 1377, 1381 (9th Cir. 1987), "courts have been virtually unanimous in their refusal to make the source of the premiums the determinative factor in deciding whether the benefits should be regarded as emanating from the employer or from a 'collateral source.'" Respondent's assertion, therefore, that the benefits should be found not to be collateral because it alone funds the pension trust account is without merit. Further, while Respondent may fund the pension trust, under ERISA the trust remains a separate and distinct entity independent from Respondent. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 332–333 (1981); *Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992); *Garland-Sherman Masonry*, 305 NLRB 511, 513 (1991). As the source of pension benefits received by the discriminatees was the trust fund and not the Respondent, said payments were clearly from a collateral source and not deductible from backpay.[17]

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[12] The Respondent had three different types of pension plans: a "70/75" plan; a "Rule-of-65" plan, and a Deferred Vested Plan (DVB).

[13] As I find that neither the pension or SUB benefits received by the discriminatees are subject to an offset from the amounts owed to them, I need not address the "lack of standing" and related issues raised by the General Counsel and the Charging Party in response to the Respondent's and the Party-in-Interest's claim for such offsets or reimbursements.

[14] In fact, Respondent in its answer admits that the discriminatees herein had vested rights in a pension plan at the time they were laid off (GCX-1[y], par. 5).

[15] Under the collateral source rule, benefits received by an injured party from a source wholly independent of the wrongdoer are not deductible from the damages a wrongdoer is otherwise compelled to pay an injured party. *Naton v. Bank of California*, 649 F.2d 691, 699–700 (9th Cir. 1981).

[16] The Board's holding in *F & W Oldsmobile* regarding the nondeductibility of vested pension benefits is consistent with various federal court decisions which have held, albeit in other contexts, that pension benefits are collateral and not subject to an offset. See, e.g., *McDowell v. Avtex Fibers, Inc.*, 740 F.2d 214 (3d Cir. 1984) (age discrimination case); *EEOC v. O'Grady*, 857 F.2d 383 (7th Cir. 1988) (age discrimination case); *Doyne v. Union Electric Co.*, 953 F.2d 447 (8th Cir. 1992) (age discrimination case); *Russo v. Matson Navigation Company*, 486 F.2d 1018 (9th Cir. 1973) (maritime claim under Federal Employers' Liability Act).

[17] *Brown Co*., 305 NLRB 62 (1990), cited by Respondent for the proposition that monthly pension benefits received by a discriminatee must be counted as interim earnings, does not warrant a different result. Thus, while it is true that in *Brown Co.*, pension payments received by a discriminatee, Reilly, during his backpay period were to be returned

A similar finding is warranted with respect to the SUB payments received by the discriminatees for one year following their layoff. As noted, the SUB plan is an employer-funded welfare trust which, like the pension trust, was established, and is governed by, ERISA regulations (RX-12, Art. 24; RX-138. p. 41). The purpose of the fund is to provide unit employees affected by a layoff caused by a reduction in force or permanent shutdown with weekly benefits to supplement their State unemployment benefits. Respondent makes payments to the fund on behalf of employees based on the number of hours worked by the latter. Those monies are then held in trust for employees until such time as an employee becomes eligible to receive such payments. To be eligible, a laid off employee must have at least two years of continuous service with Respondent, during which period the employee would earn one-half credit unit for each week worked, not to exceed 104 credit units. Thus, an employee laid off after two years would have accrued 104 credit units, thereby entitling him or her to 52 weeks of SUB benefits. To receive these accrued benefits , the laid off employee must apply for and be receiving State unemployment benefits, be available for work, and report and apply for SUB benefits in person at the laid off employee's last place of employment (RX:138, Sec. 3). There is no question that the SUB payments received by the discriminatees herein were benefits that each discriminatee had accrued and was entitled to receive when their respective plants closed and they were laid off. The Respondent does not contend otherwise. In fact, when questioning the discriminatees, the Respondent described the SUB benefits they received as a "guaranteed" right to which they were entitled, suggesting implicitly that it was not free to deprive them of that right merely because it happened to be the sole contributor to the fund (see, e.g., V:964; also Dr. Evans' testimony, XIII:2486).

Nevertheless, as with the pension benefits, the Respondent argues that such payments cannot be deemed to be from a collateral source because it alone funds the SUB trust account. Its argument lacks merit, for, as found above, that fact alone does not make the fund a non-collateral source. As stated, the SUB trust account was established under ERISA rendering it an independent entity separate and distinct from the Respondent, with fiduciary responsibilities flowing to the beneficiaries of the fund and not the Respondent. Thus, when the laid-off employees became eligible to receive their vested benefits, such payments were made by the SUB trust fund, a clearly collateral source, and not the Respondent. Contrary to Respondent, I do not find the SUB payments here analogous to the "layoff allowance" paid to discriminatees in *EEOC v. Sandia Corp*., 639 F.2d 600 (10th Cir. 1980), which the court found not to be a collateral benefit. Unlike the case at hand, wherein the SUB payments derived from an independent trust fund and not from Respondent, in *EEOC v. Sandia Corp*., the layoff allowance was paid directly by the employer to the discriminatee. Further, the court in *EEOC v. Sandia* characterized the layoff allowance as being akin to a severance payment, id. at 626, a type of benefit that the Board has long found to be deductible from backpay. *Houston Building Services*, 321 NLRB 123, 127 (1996); *Continental Insurance Co*., 289 NLRB 579, 583 (1988); *W. R. Grace & Co*., 247 NLRB 698, 699 (1980). Accordingly, I reject Respondent's claim that *EEOC v. Sandia* is applicable here, and instead find that the SUB payments received by the discriminatees are collateral benefits and not deductible from the backpay owed to them.

either to the employer or to the pension plan (id. 72–73), it is not clear from that decision whether Reilly had been vested in the pension plan. In fact, the General Counsel's position in that case, that Reilly would "have to reimburse the pension fund for amounts received during months for which [he] ultimately receives backpay," suggests the likelihood that Reilly may not have been vested. In the absence of such evidence, it cannot be said that the holding in *Brown Co.*, is inconsistent with, or a deviation from, the Board's prior holdings in *F & W Oldsmobile* and *Workroom for Designers*, supra.

D. The Mitigation Issues

1. General observations and findings

In October 1994, the General Counsel, through Board Agent Bruce Standish, sent each discriminatee a questionnaire that asked them, among other things, to state whether they would have accepted an IPJO transfer following their layoff and, if so, to identify the facilities to which they would have gone, and the year(s) in which they would have accepted said transfer. The discriminatees were note their answers by checking of the applicable box(es) labeled Burns Harbor, Derry, or Passaic. Discriminatees were also provided with Search for Work forms and instructed to list therein the employers contacted during their backpay periods, the year and calendar quarter the contact was made, the employer's address, and the result of that contact (see, e.g., GCX-4).[18]

As made evident by their individual testimonies below, most if not all of the discriminatees had difficulty recalling all the contacts made and consequently listed only those they were able to recall. Many of them returned the search forms to Standish either only partially filled out or with no entries at all. The Respondent suggests that the discriminatees inability to accurately recall the full extent of their job searches is due to the Regional Office's delay in getting the search forms out to the discriminatees in a timely manner, and that the discriminatees' "failures of recollection due to the passage of time should not be held against U.S. Can" (p. 91 fn. 61).

The Respondent can hardly place the blame for the discriminatees' poor memory on the Regional Office, for any delay in this proceeding is the product of its own wrongdoing, caused in large measure by Respondent's refusal to accept the judge's August 1990, finding that it had violated the Act, and the Board's January 1992, decision upholding the judge's findings and directing it to make whole any laid off employee for losses resulting from its unlawful conduct. While the Respondent was clearly within its rights to pursue all legal avenues available to it, including appealing the Board's decision to a federal court, there can be no disputing that the passage of time resulting from Respondent's own behavior had as much of an adverse effect on the discriminatees' inability to recall as the Regional Office's 20-month delay from January 1993, when the Respondent's appeal was rejected by the Seventh Circuit, to October 1994, when Standish first sent out the Search for Work forms to

[18] Standish retired sometime in late 1995 (II:157). Prior to the hearing, the Respondent served a subpoena Duces Tecum on the Regional Director for Region 13 seeking, inter alia, "notes of Board Agent Bruce Standish reflecting factual communications between agent Standish and the alleged discriminatees. . . ." The General Counsel thereafter petitioned to have the subpoena revoked (see, GCX-1[w], and attachments; GCX-1[z]). I granted the General Counsel's petition to revoke (II:155–162), after which the Respondent took a special appeal which was denied by the Board on September 30, 1996, without prejudice to Respondent's right to raise the issue in exceptions.

the discriminatees. Consequently, Respondent's suggestion that it bears no responsibility for the discriminatees' lack of recall is simply not true, and its attempt to shift all blame to the Regional Office for such deficiencies in memory is found to be without merit. Further, assuming arguendo, that the Board's delay may have contributed to discriminatees' inability to recall, it is well settled that the Board is not required to place the consequences of its delay, even if inordinate, on the wronged employees, to the benefit of wrong doing employers. *Teamsters Local 469 (Coastal Tank Lines)*, supra at 11 (1997), citing *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264 (1970); also *Unitog Rental Services*, 318 NLRB 880, 885 (1995). As aptly noted by the Court in *J. H. Rutter-Rex Mfg*., "[w]ronged employees are at least as much injured by the Board's delay in collecting their backpay as the wrongdoing employer." Nor would it be just to deny backpay to the discriminatees simply because of their inability to recollect the specifics of job searches that occurred some 3–6 years earlier, as it is reasonable to expect that memories would fade after the passage of such long periods of time.

The Respondent nevertheless disputes the efforts made by discriminatees to mitigate their damages, and again relies heavily on Dr. Evans' testimony. Dr. Evans, using a compilation of statistics, testified that during the discriminatees' backpay periods the unemployment rate for the manufacturing sector of the economy in the regions where Respondent's plants are located was relatively low, while the rate of unemployment among the laid off discriminatees was by comparison unusually high or "vastly in excess" of what it was for the manufacturing industry in general. He also produced statistics and charts from census data designed to show that individuals of the same age group and race as the discriminatees, who had been laid off from long-term employment with other employers during the same period as the discriminatees, were able to secure employment within 1 year following their layoff. Their success, according to Dr. Evans, stood in sharp contrast to the discriminatees' claimed inability to find work during their first and even second year following their layoffs. On the basis of their high unemployment rate vis-a-vis the manufacturing industry as a whole, their inability to find work during the first year of unemployment when similarly situated individuals had met with success, and on a review of the entries made by discriminatees in their Search for Work forms, Dr. Evans concluded that "the lack of success in finding a job for this many people is highly suggestive of, in general, not a serious search effort" on the part of the discrminatees as a class to find work. He conceded, however, that no such conclusion can be drawn from such statistics with respect to whether a particular individual discriminatee had engaged in a serious job search during the year following his or her layoff (XIII:2728–2729).

The Respondent would have me infer from Dr. Evans' above testimony, and from numerous help wanted ads it produced at the hearing purporting to show that jobs were available during the backpay periods, that the discriminatees should have been able to find work had their efforts been more diligent, and that their failure to do so is proof that they did not engage in serious search for work efforts. This same argument, however, was previously considered and rejected by the Board in *Food & Commercial Workers Local 1357*, 301 NLRB 617 (1991). In doing so, the Board there held that the employer's "attempt to equate [a discriminatee's] lack of success with a lack of trying is a bootstrap argument that runs counter to Board and court precedent." Id. at 621. Like the Respondent here, the employer in the cited case asked the Board to infer, from testimony of an expert in labor market economics and a compilation of statistics, that because "comparable work was plentiful, the discriminatee in question "could not have exercised reasonable diligence in seeking work because she remained unemployed." Id. The Board, however, declined to do so, reiterating the long held view that a "respondent's burden is not met by presenting evidence of a lack of employee success in getting interim employment . . . rather, [a respondent] must affirmatively demonstrate that the employee neglected to make a reasonable effort to find interim work." Id.

Regarding the expert witness' testimony in that case, the Board found it not to be probative on the issue of whether the discriminatee had used reasonable diligence in seeking work, in part because the expert was only "referring to the probability of job opportunities, not to a given individual's situation," and because he admitted "forming his opinions" about the discriminatee without having any personal knowledge of the latter's particular circumstances. Here, Dr. Evans likewise based his testimony not on any actual knowledge of a particular discriminatee's circumstances surrounding his or her job search, but rather on statistical probabilities. As noted, Dr. Evans never spoke with or interviewed any of the discriminatees. Thus, I reject Dr. Evans' testimony as not probative on the question of whether any of the discriminatees engaged in a reasonable job search during their respective backpay periods, and further find no probative value to the statistics used by him to support his conclusions. See *Continental Insurance Co.,* 289 NLRB 579, 583 (1988), citing *Flite Chief, Inc*., 258 NLRB 1124 (1981).

Finally, Respondent's production of help wanted ads to show that jobs were available during the discriminatees' backpay periods does not establish that the discriminatees did not diligently look for work. There is no way of knowing, for example, if any or some of the discriminatees applied to the jobs advertised. The Respondent in this regard never asked the discriminatees whether they had applied to any of the advertised positions. To the extent such advertised jobs do not show up on any of the discriminatees' search forms, that could easily be explained by the discriminatees' testimony that they were unable to recall all the employers they may have contacted when they were filling out their search forms. The simple fact is that the Respondent has not shown that discriminatees did not apply for any of the advertised jobs it produced at the hearing. In any event, the mere existence of such ads does not establish that the jobs would have been available when and if any of the discriminatees applied, or that any of them would have been selected for any of the positions shown. *Murbro Parking, Inc.,* 276 NLRB 52 (1985); also *Delta Data Systems Corp*., 293 NLRB 736, 739 (1989).

The Respondent further argues that in addition to Evans' testimony and the help wanted ads, the individual testimony of most discriminatees supports a finding that they either failed to mitigate their damages and/or would not have transferred to another facility. A separate discussion of each discriminatee's testimony regarding these two issues follows.

2. The individual discriminatees

John G. Battles

Battles was a mechanic at the Clearing facility until laid off on December 18, 1987. Following his layoff, he applied for and began receiving Illinois State unemployment benefits, and also received SUB pay through March 1988, at which point the

benefits terminated when he obtained a job at Respondent's Elgin plant. Battles claims he began looking for soon after being laid off, and testified that had he been allowed to transfer to another of Respondent's facilities following his layoff, including the Derry plant, he would have done so. Respondent offered no evidence to contradict Battles' claim in this regard. The specification first imputes to him a vacancy filled at the Derry plant by new hire representative employee Kevin Quick on June 27, 1988, and then following Quick's termination on January 15, 1989, alleges Battles would have bumped into the position held at Derry by less senior new hire representative employee, Emile Marquis. Battles' backpay period is alleged to run from June 27, 1988, through July 11, 1990, when Marquis was terminated and there was no other less senior new hire representative for Battles to bump (attachment 1).

The Respondent concedes that Battles engaged in reasonable efforts to obtain work following his layoff, but does not believe Battles would have taken an IPJO transfer to the Derry facility because by June 1988, his earnings from his employment at the Elgin plant was paying him more than what he would have earned by transferring to Derry. Moreover, the Respondent finds it "inconceivable" that Battles "would have taken his wife away from the job she held for ten years and his seventeen-year-old daughter from high school to take a job at Derry so that he could move to Derry to make less money" (RB:55). Regardless of what Respondent may wish to believe, the fact remains that it produced no evidence to contradict Battles' above assertion about accepting such a transfer. Battles, on the other hand, was a convincing witness who I find testified in an honest and straightforward manner. Accordingly, I accept as true his claim that he would have taken an IPJO transfer had it been made available to him, and I find that Battles is entitled to backpay in the amount of $3362, as set forth in attachment 1 of the specification, with interest.

Robert Bennett

Bennett was laid off December 23, 1987, at age 57, from his setup and adjuster position at the North Grand plant, after which he registered for work with the Illinois Unemployment office and began receiving State unemployment benefits, and SUB payments from Respondent. When his SUB benefits ran out, Bennett was put on a pension. He testified he would have accepted a transfer to one of Respondent's other facilities, including the Derry and Passaic plants, had it been offered to him following his layoff, an offer that was never made, and would have worked until either age 62 or 65 (IV:596). The specification imputes to Bennett the vacancy filled by new hire Representative employee Jim Murdock on January 8, 1988, at the Passaic facility. It further alleges that when the Passaic facility closed, Bennett would have bumped into a position at the Derry facility occupied by new hire representative S. Boylorn on September 18, 1988. With Boylorn's termination on January 6, 1991, no further vacancies are imputed to Bennett as there was no less senior employee for him to bump. Amended Attachment 2 of the specification (GCX-2) thus alleges that Bennett's backpay period runs from January 8, 1988,
to January 6, 1991.

In late 1994, Bennett filled out and returned to Board agent Standish Search for Work forms listing some of the job contacts he made during the backpay period. He testified that in 1994, when he filled out the forms, he was unable to recall all the employers he may have contacted during his backpay period and that, consequently, his search forms reflect only those he was able to recall. Bennett claims he searched for work at least three times a week from the day he was laid off to at least January 1991, and that he did so by looking through the want ads in local newspapers, asking friends and relatives for job leads, and personally stopping in at different employers. He further noted that he did not limit his job search to just Chicago, but also searched for work in the Detroit and Indianapolis metropolitan areas (IV:608).

The Respondent finds it "highly doubtful" that Bennett would have been willing to uproot himself and his family from the Chicago where he had lived most of his life, take his daughter out of high school, have his wife give up a good job with IBM and give up his SUB and unemployment compensation to move first to Passaic and subsequently to Derry for an entry level position. While there is some appeal to Respondent's argument, it again constitutes nothing more than Respondent's own personal doubts as to how Bennett might have reacted had it presented him with an IPJO transfer opportunity. Clearly, it is Respondent's prerogative not to believe Bennett if it so chooses, but that alone does not render Bennett's testimony unworthy of belief or suffice to satisfy its burden of proof. Rather, if it hoped to prevail in its efforts to deny backpay to Bennett on a claim that he would not have transferred in the first place, then it was required to produce facts to support that claim, and not merely speculate as to what Bennett might have done. Having failed to do so, Bennett's testimony about his willingness to transfer in 1988 to either the Passaic or the Derry plant stands unrefuted. Bennett was a credible witness who, I find, testified in an honest and straightforward manner. I therefore credit his testimony and find that had he been given the opportunity, Bennett would have gone to either the Passaic or the Derry plant as alleged in the Specification.

The Respondent further claims that Bennett failed to mitigate his damages because his Search for Work forms show only five to seven contacts per quarter in 1988, and none for 1989 or 1990. However, as credibly explained by Bennett, the search forms did not include all the job contacts made during the backpay period, only those he was able to recall in 1994. Further, given that he collected state unemployment benefits for at least 6 months following his layoff, it is reasonable to assume that Bennett would have made at least three job contacts per week, as was required by the State of Illinois. The Respondent does not dispute that Bennett received such benefits. In fact, Bennett would not have received SUB pay unless he was also registered with the state unemployment office and receiving such benefits. Thus, it is clear that Bennett's job search during 1988 involved much more than the five to seven contacts per quarter shown on his search form. That Bennett was unable to recall any more names in 1994 to include in his search form is neither unusual nor suspicious, and indeed readily understandable, and does not automatically disqualify him from receiving backpay. *United Aircraft Corp*., 204 NLRB 1068 fn. 4 (1973). *Tilden Arms Management Co.,* 307 NLRB 13, 16 (1992); *Allegheny Graphics,* 320 NLRB 1141, 1145 (1996), citing *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966), affd. 395 F.2d. 241 (1st Cir. 1968). Moreover, his failure to list in his search forms any of the job contacts he may have made in the Detroit and Indianapolis areas is also reasonably attributable to his poor memory.

The Respondent nevertheless argues that Bennett's above explanation is not credible, noting in this regard that while his 1988 search form contains the names of employers he contacted

that year, his more recent 1989 and 1990 search forms contain no entries whatsoever. It asserts that if the passage of time had truly affected Bennett's recall abilities, it is more logical to believe he would have remembered the more recent contacts made in 1989 and 1990, rather than those made in 1988. Bennett, however, was never asked by Respondent to explain what it was about the employers shown in the 1988 search form that caused him to remember them specifically, but not those contacted in 1989 and 1990. It may very well be that Bennett had some plausible explanation for recalling his 1988 job contacts but not those made in 1989 and 1990. In the absence of any such explanation, I decline to infer that Bennett did not look for work during 1989 or 1990. At most, the lack of an explanation creates only an element of doubt, which in any event I resolve in Bennett's favor, and not the Respondent.

Finally, the Respondent contends that Bennett should not receive any backpay from the second quarter of 1990 through the first quarter of 1991, because he readily admitted at the hearing to being "retired" when his 1989 tax return was completed in April 1990 (RX-23). His 1989 tax return, as well as his 1990 return, both contain the word "retired" in the occupation box of the form. Asked if he considered himself retired when his 1990 return was completed in April 1991, Bennett responded, "yes" (IV:652–653). His testimony coupled with the entries found in his tax return, the Respondent argues, establishes that Bennett had in fact retired by April 1990. I disagree.

Although Bennett did respond affirmatively when asked if he considered himself retired when his 1989 and 1990 tax returns were completed, it does not necessarily follow that he had in fact removed himself from the job market and was no longer searching for work. In fact, as previously noted, Bennett also testified without contradiction that he continued looking for work through at least January 1991, clearly suggesting that he indeed remained in the job market regardless of the "retired" entry on his tax forms. It is quite possible therefore that Bennett, like other discriminatees (see discussion below on Byers, Connor, Hawkins, Kmic) whose tax returns also contained a "retired" entry, may have equated the term "retired" with his receipt of a pension, or with being unemployed. Thus, Bennett was never asked by Respondent to explain why he would put "retired" on his tax return when he also claims he was still looking for work. In the absence of any such explanation, an inference that Bennett had in fact "retired," that is, was no longer in the job market, based solely on the "retired" entries on 1989 and 1990 tax returns, is simply not warranted, particularly given his undisputed testimony that he was still searching for work. The entry, at most, raises a doubt as to whether or not Bennett had in fact "retired," which I decide in Bennett's favor.

In sum, I find that the Respondent has not met its burden of showing that Bennett failed to mitigate his damages at any time during his backpay period by not diligently looking for work or by otherwise engaging in a willful loss of earnings. Accordingly, I conclude that Bennett is entitled to backpay in the amount of $92,876., as set forth in amended attachment 2 of the Specification (see GCX-2), with interest.[19]

[19] The General Counsel's posthearing brief erroneously shows Bennett's backpay to be $93,160. (GCB:49.) The General Counsel amended attachment 2 at the hearing to attribute an additional $284 in interim earnings to Bennett, thereby reducing his backpay amount to $92,876. (IV:592; GCX-2.)

Alan Byers

Byers was laid off from his die setter and maintenance mechanic's job at the Clearing plant on December 18, 1987, at age 55. He registered for unemployment benefits with the Illinois State Unemployment Office, and received SUB pay for 1 year following his layoff, although eligible for 2 years. At the end of his first year of SUB pay, he was told by Respondent he would not be receiving the additional year, but instead would begin getting pension benefits because it had no job to offer him. Byers claims he would have taken an IPJO transfer to any of Respondent's other facilities, including the Passaic and Derry plants, had he been allowed following his layoff, but was never offered that opportunity. The specification first imputes to Byers a vacancy filled by new hire representative employee D. Hunsucker at the Passaic facility on March 7, 1988, and subsequently, following Hunsucker's termination due to the closure of the Passaic plant, a position held by less senior new hire Representative M. Stewart at the Derry facility on September 18, 1988. Further, with the termination of Stewart on July 2, 1989, Byers purportedly would have bumped into the position held by less senior new hire representative employee R. DePew. Byers' backpay period is alleged to run from March 7, 1988, to January 6, 1991, when DePew was terminated, and there was no other less senior new hire employee for Byers to bump (attachment 3).

In late 1994, Byers filled out and returned to Board Agent Standish Search for Work forms listing the names and addresses of some of the employers he contacted during the backpay period. The search forms, however, do not contain all the contacts made during that period. Byers explained that he simply was unable to recall all the employers he may have contacted several years earlier, and that the forms only show about 20–25 percent of the total number of employers contacted.

The Respondent disputes Byers claim that he would have taken an IPJO transfer following his layoff. It did not, however, produce facts to refute Byer's assertion. Instead, the Respondent posits that because Byer's son was still in high school in 1988, and Byer's wife had undergone heart bypass surgery that year, rendering her homebound for some 4–5 months, Byers would not have wanted to move. Speculation and conjecture, however, do not constitute evidence and clearly cannot serve as a basis for denying Byers the backpay to which he may be entitled. As further support for its theory, the Respondent points to Byers admission that he did not know where the Derry and Passaic plants were located. Again, Byers' lack of knowledge in this regard hardly constitutes proof that Byers would have rejected a transfer to either of those facilities had the opportunity presented itself. In the absence of any evidence to the contrary, I credit Byers uncontradicted assertion that he would indeed have taken an IPJO transfer regardless of the plant's location. Bennett struck me as having testified in an honest and truthful manner.

The Respondent also argues that Byers failed to mitigate his damages, pointing to Byers' own testimony that his search forms contain only about 20 percent of the total contacts made during the backpay period. The Respondent notes that this averages out to less than three job contacts per week, an inadequate amount, in its view, to constitute a diligent job search. However, Byers' testimony regarding the 20–25-percent figure was nothing more than an estimation, and not intended to be a precise statement of the number of job contacts made by him. Byers, as noted, also testified to having made at least three

contacts per week, which was sufficient to allow him to receive unemployment benefits. The fact that he received such benefits, which the Respondent does not contest, lends support to Byers' testimony that he complied with the State Unemployment job search requirements of three contacts a week. Had he not done so, it is unlikely he would have received such benefits.

The Respondent further points to the fact that Byers listed himself as "retired" on his 1988 tax return, signed April 13, 1989, and that, having retired, Byers is, consequently, not eligible for backpay for the second, third, and fourth quarters of 1989, and all of 1990. Regarding the "retired" entry on his tax return, Byers credibly explained that his tax preparer made the entry after Byers told him that he was unemployed and receiving a pension. Thus, while Byers may have allowed his tax preparer to show him as "retired" on his tax return, Byers obviously equated the term "retired" with being unemployed and on a pension. Byers, however, never considered himself as being "retired" for he testified that he continued looking for work even after he began receiving a pension from Respondent. I note in this regard that Byers never asked to be placed on a pension, but instead had it thrust upon him by Respondent, presumably in order to avoid having to pay him another year of SUB benefits. Thus, I credit Byers and find that regardless of the "retired" entry on his tax return, Byers was not "retired," but was still actively and diligently looking for work. The Respondent has produced no facts to suggest otherwise. Accordingly, I find that Byers is entitled to backpay in the amount of $94,613, as set forth in attachment 3 of the specification, with interest.

Patsy Camardo

Camardo worked at the North Grand facility until laid of on December 23, 1987. He testified that he would have taken an IPJO transfer to any one of Respondent's other plants, including the Derry plant, if given the opportunity, and would have continued working for Respondent for another 10 years, or until 1997 (II:199–201). His backpay period allegedly begins on January 7, 1988, when new hire Representative O'Neill was hired to fill a vacancy at the Derry plant, and ends when O'Neill was terminated on January 27, 1991, after which there was no other less senior new hire representative employee at the Derry plant that Camardo could have bumped (attachment 4 fn. 1).

The Respondent avers that while Camardo may have been willing to transfer to the Burns Harbor facility, it does not believe he would have gone to Derry. In support, it points to the questionnaire Camardo filled out and sent to Board Agent Standish on October 16, 1994, wherein he indicated he "was really more interested in going to Burns Harbor," and at another point in the questionnaire wrote, "I would have gone to *Burns Harbor*." (GCX-4). I do not interpret Camardo's comments on the questionnaire as suggesting that he would have accepted a transfer *only* to Burns Harbor, for a further scrutiny of his questionnaire reflects that Camardo also stated he was willing to accept a transfer to either the Derry or the Passaic plants. Thus, I am convinced, particularly in light of his testimony at the hearing, that Camardo's comments about being more interested in going to Burns Harbor was nothing more than an expression of his preference of facilities, and not an indication that he was unwilling to accept a transfer to some other facility (II:211).

The Respondent cites other reasons for believing Camardo would not have transferred to Derry. It points out, for example, that Camardo had purchased a house only 2 years earlier and had two grown sons, making it more likely than not that he would only have accepted a transfer to Burns Harbor, the facility nearest to him and would not have gone to the more distant Derry plant. Camardo, the Respondent further notes, also knew his SUB pay would terminate if he were to accept a transfer to one of its other facilities. Additionally, Camardo would have had to pay his own way to Derry to interview for a position, and did not know if he would be allowed to work his preferred second shift at Derry. Finally, it cites testimony by Proskey that when the latter purportedly asked Camardo if he was interested in transferring to Respondent's Elgin facility, Camardo responded he "was too old to be starting all over again," and intended to work as long as he could at North Grand and would retire when the plant shut down (XI:2084). Respondent's above arguments are without merit.

Initially, Camardo's claim that at no time prior to or after his layoff did any Company official ask if he wanted a transfer contradicts Proskey's testimony that the two talked about a possible transfer at some point prior to Carmardo's layoff (II:201). As between the two, I found Camardo to be the more credible and credit his denial that any such conversation took place. However, even assuming, arguendo, that at some point prior to his layoff Camardo expressed an interest in retiring, his Search for Work forms make clear he did not do so, but instead began a diligent search for, and indeed found, interim employment. Thus, I reject Respondent's contention that Camardo retired once the plant closed. Further, Respondent's claim that Camardo would not have wanted to move to Derry because he had bought a house 2 years earlier, had two grown children, and was unaware of what shift he might be given at the Derry plant, is on its face so highly speculative as to warrant little or no discussion, and is rejected.

As to Camardo's mitigation efforts, the Respondent contends that because Camardo quit a job he obtained in April 1989 with Nazareth Academy, doing general mechanical and maintenance work, to take another job doing security and maintenance at Plymouth Place, a retirement home, which paid him $2 less an hour, his interim earnings should be increased by $2 per hour beginning with the second quarter of 1989, when he began working with Nazareth Academy, through the end of his backpay period (RB:59). Respondent's contention is without merit.

As a general rule, when an employee secures substantially equivalent employment with comparable wages, hours, and working conditions, the quitting of such employment without good cause is deemed to be a willful loss of earnings justifying a reduction in backpay. However, when the quit from interim employment was from a job that was unprestigious or annoying, or that created unacceptable disruptions to the discriminatee's private life, the Board does not expect the discriminatee to retain such interim employment. In those circumstances, a discriminatee's quit or discharge from a nonequivalent interim employment does not constitute a willful loss of earnings and will not reduce the discriminatee's backpay. See *Churchill's Supermarkets*, 301 NLRB 722, 725 (1991), citing to *Newport News Shipbuilding*, 278 NLRB 1030, 1033 (1986).

The Respondent here does not contend, nor does the evidence show, that Camardo's job with Nazareth Academy was substantially equivalent to the one he held with the Respondent just prior to his layoff. Further, Camardo credibly explained that he left his job at Nazareth Academy after 1 year because the work was too strenuous and had aggravated a diabetic condition, prompting his physician to recommend he terminate his

employment at the school (II:233). His testimony in this regard was not refuted by Respondent. In these circumstances, I find that Camardo had a reasonable basis for quitting his employment with Nazareth Academy, and that no reduction in his backpay is warranted by virtue of his having taken a lower paying job at Plymouth Place. Accordingly, I conclude that Camardo is entitled to backpay in the amount of $85,299 as set forth in Attachment 4 of the specification, with interest.

Willie Conner

Conner was laid off at age 58 from his coil shearer job at the Clearing facility on February 17, 1990, after which he registered for work with the Illinois Unemployment Office and began receiving state unemployment compensation. He also received SUB benefits from Respondent, and when the latter ran out in or around March 1990, he began receiving pension benefits. Conner testified that he began looking for work immediately following his layoff, that he continued looking for work even after receiving a pension, and that he eventually found work in 1992, as a doorman in an apartment complex (IV:708). Conner claims to have made at least 2–3 employer contacts per week, and did so by personally going out to different plants, including other can companies, searching through newspaper want ads, making phone calls, and asking friends for job leads (IV:676, 680).

Conner testified, consistent with statements made in the 1994 questionnaire he sent to Standish, that had he been allowed to take an IPJO transfer to another facility, including the Derry plant, following his layoff, he would have done so, and worked until he reached age 65 (IV:673). In 1994, he completed Search for Work forms listing therein some of the employers he contacted during his backpay period, which the specification alleges runs from April 25, 1990, to January 6, 1991. Conner, however, explained that not all the contacts he made are reflected in his search forms because he simply was unable to recall in 1994 all the employers he may have contacted some 3–4 years earlier (IV:707). He claims that while he had kept records of his job searches in his basement, some of those records were destroyed following a flooding of his basement, and that those he managed to salvage were turned over to Standish and Regional Office (IV:704). The General Counsel represented that no such records were found in the Board's files. The Specification imputes to Conner a vacancy filled by new hire representative, L. Casimir, at the Derry plant on April 25, 1990, with a backpay period, as noted, running through January 6, 1991, Casimir's termination date (GCX-21; GCX-2, amended attachment 5). The specification does not allege any backpay for Conner after Casimir's termination because there was no other less senior new hire employee that Conner could have bumped.

The Respondent disputes Conner's claim that he would have transferred to its Derry facility, pointing to the fact that Conner's 1989 tax return, dated March 9, 1990, lists him as "retired." It further notes that although Conner made entries in his search forms for 1989 and the first quarter of 1990, no entries were made for any period after that, suggesting that Conner stopped looking for work at around the time he began receiving his pension, thereby supporting its position that he had indeed retired. Finally, it suggests that given the amount of SUB and pension benefits he was receiving, it would have made no sense for Conner to transfer to the Derry plant. Respondent's above arguments are without merit.

As to the "retired" entry on his 1989 as well as 1990 tax return, Conner, who I find testified in an honest and straightforward manner, credibly explained that the "retired" entry was inserted by his accountant after Conner stated he was receiving a pension from Respondent. The accountant advised him that because he was on a Company pension, that was tantamount to being on retirement and, consequently, inserted "retired" on the 1989 tax form, and again in the following year's tax form (IV:695). Conner testified, credibly in my view, that he never viewed himself as being retired even after he began receiving his pension and, in fact, continued thereafter to look for work. The fact that he found work as a doorman in 1992, lends support to his claim about having continued to look for work. Regarding the lack of entries in his search forms, Conner, as noted, credibly explained that he simply could not recall all the job sites he may have visited or contacted during the backpay period. His poor recollection in this regard is understandable given the passage of several years time between his job search during the backpay period, and 1994, when he was asked by Standish to recall the details of that search.

The Respondent contends that Conner should not be believed because despite claiming he turned over some of his job search records to the Regional Office, no such records were found in the Regional Office's files. However, that the Regional Office may not have had any such records in its file does not necessarily mean that none were turned over by Conner, and I decline to discredit Conner on this basis alone, particularly since I found him to be a generally credible witness. Finally, Respondent's claim that Conner would not have wanted to transfer given the SUB and pension benefits he was receiving during his backpay period is speculative at best and lacking in factual support. In sum, the Respondent produced no evidence whatsoever to establish that Conner would not have accepted an IPJO transfer to the Derry plant, or to show that engaged in a willful loss of earnings by failing to look for work during his backpay period. Accordingly, I find that Conner is entitled to backpay in the amount of $18,256, as set forth in amended attachment 5 of the specification (GCX-2), with interest.

Anthony Eardley

Eardley was laid off from his tool-and-die maker position at the Passaic plant on October 21, 1988, at age 60. In October 1994, Eardley filled out and returned the questionnaire sent to him by Board Agent Standish stating, inter alia, that he would have taken an IPJO transfer to the Derry facility following his layoff had he been allowed to do so (GCX-28), a statement he reaffirmed at the hearing. The specification imputes to him a position filled by new hire Representative K. Bernier at the Derry plant on January 6, 1989, and alleges that his backpay period runs from that date to January 6, 1991, when Bernier was terminated, and there was no other less senior new hire representative employee for him to bump.

Eardley claims he began looking for work soon after he was laid off, contacting at least three employers per week through leads he obtained from friends, from newspaper help wanted ads, and by simply going around to different plants, and that he continued doing so through at least January 6, 1991 (VI:1176). In late 1994, Eardley filled out Search for Work forms listing the job contacts he recalled making during his backpay period, and inserted a "not hiring" notation below each entry. He also registered for employment with the New Jersey State Unemployment Services, reporting his job searches to them once a

week, and collected unemployment benefits for 6 months. He also received SUB pay from Respondent for 1 year following his layoff, and when those benefits expired he began collecting pension benefits. Eardley did find work as a full-time machine operator with Standard Tool Company on April 8, 1990, but was laid off just 2 months later (VI:1190). He thereafter resumed his job search and, in August 1990, unable to find full-time employment, took a part-time job with Rexon Company, where he remained until laid off towards the end of the first quarter of 1991 (GCX-28). Eardley admits not looking for full-time work after getting his part-time job at Rexon because he was satisfied with the job (VI:1195).

The Respondent disputes Eardley's claim that he would have accepted a transfer to the Derry facility, but offers nothing in the way of evidence to refute it. Instead, it simply argues that it would have made no economic sense for Eardley to transfer at that time given the SUB payments and unemployment compensation he stood to receive following his layoff, and the likelihood that his wife may not have wanted to leave her job of 20 years to go to Derry. It further doubts that Eardley would have gone alone to Derry and left his family behind, as Eardley suggests in his testimony, because it meant he would have had to incur additional housing costs as well as commuting expenses. Eardley, the Respondent points out, "had no idea how long it takes to drive from Derry to Passaic, and claims that "once he found out, he likely would have decided not to IPJO" (RB:42).

In making the above arguments, the Respondent chooses to ignore the very elemental fact that its burden of proof in a compliance proceeding can only be met with facts sufficient to support its contention, and cannot rest on mere speculation and conjecture, which is all the Respondent has proffered here. Thus, it produced no evidence to contradict Eardley's testimony as to his willingness to go to Derry, even if meant leaving his family behind and having to commute back and forth between his Derry job and his Passaic home. Respondent's unwillingness to believe Eardley in this regard does not, without more, constitute legitimate grounds for rejecting Eardley's testimony. In any event, from a demeanor standpoint, I am convinced Eardley testified truthfully and honestly. Accordingly, I credit his testimony and find that he would have accepted a transfer to the Derry plant following his layoff had he been given that opportunity.

As to his mitigation efforts, the Respondent claims that Eardley is not entitled to backpay for 1989, arguing that it is highly unlikely that each and every employer Eardley contacted that year would not have been hiring, as Eardley indicated in his search form. It contends that a more probable scenario is that Eardley did not actually look for work because of the SUB and unemployment benefits he was receiving, and merely went through the motions of doing so in order to satisfy the requirements of the state unemployment office. The Respondent suggests that if Eardley had truly been looking for work, his entries on the 1989 search form would have contained notations such as "not qualified" or "will call" or "rejected" (RB:42). Again, the Respondent engages in speculation and conjecture, for it never questioned Eardley regarding these particular entries. Thus, there is no way of knowing if Eardley used the term "not hiring" to mean precisely that, or used it in a more generic sense to include any and all reasons given him by employers for not hiring him. It is also possible that in filling out the forms in 1994, Eardley did not recall the specifics of why particular employers refused to hire him and simply jotted down that the employer was "not hiring." The Respondent, in any event, produced no evidence of its own to establish that some or all of the employers Eardley contacted in 1989 were indeed hiring. Accordingly, I find that the Respondent has not sustained its burden of showing that Eardley failed to mitigate his damages during 1989.

The Respondent does not question Eardley's mitigation efforts for the first half of 1990, but claims that Eardley's decision to remain in a part-time position at Rexon and not look for full-time work amounted to a willful loss of earnings, citing as support for its position the Board decision's *Lundy Packing Co.*, 286 NLRB 141 (1987). That decision does not support its position. In fact, the Board in *Lundy Packing* declined to toll backpay for discriminatees who had engaged in part-time work during their backpay period, noting that doing so would have "the effect of condemning them for accepting part-time jobs, despite the fact that such jobs had the effect of mitigating the Respondent's damages, at a time when they had gone through recurrent but fruitless efforts to find employment." Id. at 144. Here, following his layoff from Standard Tool, Eardley, like the discriminatees in *Lundy Packing*, renewed his efforts to find full-time employment as he had done following his layoff by Respondent. Unable to find full-time employment, Eardley was forced to take the part-time job with Rexon. I see no reason to penalize Eardley for mitigating Respondent's damages by accepting the part-time position with Rexon following his unsuccessful efforts to find full-time work. That Eardley chose to stay with Rexon rather than continue his search for full-time employment does not constitute a willful loss of earnings for, given his lack of success and that of other discriminatees here, there is no reason to believe that Eardley would have had anymore success in finding full-time employment while working part-time with Rexon than he before landing the Rexon job. Id. In this regard, the Respondent has not demonstrated that Eardley could have landed a full-time job had he continued looking, or that he was offered but refused to accept full-time employment at any time during his backpay period, including after he began working for Rexon. In these circumstances, I find, as did the Board with the discriminatees in *Lundy Packing*, that Eardley should not be penalized for failing to continue looking for full-time employment after landing his part-time Rexon job. Accordingly, I conclude that Eardley is entitled to backpay in the amount of $52, 961, as set forth in attachment 6 of the specification, with interest.

Earnest Finn

Finn, as previously indicated, was laid off from his Clearing job on December 18, 1987. He testified, consistent with the questionnaire he returned to Standish (GCX-26), that had he been allowed to transfer to any of Respondent's other facilities following his layoff, he would have done so (VI:1005–1006). As previously noted, the new hire position first imputed to him in the specification is that of new hire Representative Gizzi at the Passaic facility. Following Gizzi's termination on September 2, 1988, the specification asserts that Finn would have bumped into several other new hire representative positions until S. Blake, the last of these at the Derry plant, was terminated on October 14, 1990. Finn was thereafter ineligible to bump as there were no less senior new hires for him to displace. As amended at the hearing, his backpay period is alleged to run from his December 18, 1987 layoff date, to October 14, 1990.

The Respondent concedes that Finn mitigated his damages (RB:76), but disputes Finn's claim that he would have transferred to either the Passaic or Derry plants if given the opportunity. In support, Respondent points to the testimony of supervisors William Riha and Donald Heicken, both of whom testified that in the Fall 1987, prior to his layoff, Finn expressed a disinterest in transferring to the Elgin facility. More specifically, Riha testified that Finn told him sometime before his layoff that he would not be interested in transferring to Elgin because it was too far (XI:2121–2122). Heicken testified to having had a "light conversation" with Finn at the Elgin facility in the fall 1987, during which he asked Finn if he would be interested in transferring to Elgin and working the second shift. Finn, according to Heicken, stated he was not interested in working the second shift because of some transportation problems, and preferred the first shift. The Respondent claims that Rhia's and Heicken's testimony make clear that if Finn had no interest in traveling the relatively short distance to the Elgin plant, it is unlikely he would have accepted an IPJO transfer to its more distant east coast Passaic and Derry facilities. This, the Respondent argues, coupled with the SUB and unemployment benefits he was receiving, provides convincing evidence that Finn would not have accepted an IPJO transfer had it been made available to him following his layoff. I disagree.

Initially, Finn denied ever speaking to Rhia (phonetically shown in the record as "Auria") at any time before his layoff about transferring to Elgin (VI:1068). However, he did recall speaking with Rhia after his layoff, sometime in 1988, during which conversation Rhia asked him to come to the Elgin plant and fill out a job application (VI:1067). Finn states he did precisely that, and also received an interview. Finn also recalls that during his visit to Elgin, he was given a tour of the plant but could not recall the individual who showed him around. Following the interview, Finn claims he was given assurances by a personnel manager that Respondent would get back to him regarding his application, but that to date, no one has ever contacted him regarding the application, and that his several efforts to follow up on his application proved unsuccessful. Finn's above testimony was not challenged by Respondent.

I found Finn's testimony about having only spoken with Rhia after his layoff to be credible. But even if I were to believe Rhia's and Heicken's assertion that Finn expressed an interest in retiring before being laid off, such testimony does not establish that Finn in fact retired following his layoff. His testimony, bolstered by his search forms showing an extensive job search, provides clear evidence that Finn actively looked for work throughout his backpay period, conduct inconsistent with someone no longer in the job market. Indeed, Respondent's concession that Finn mitigated his damages during his backpay period is tantamount to an admission that Finn did not retire but rather engaged in a diligent job search following his layoff. Accordingly, I find that Finn is entitled to backpay in the amount of $62,710., as set forth in Amended Attachment 7(a) of the specification (GCX-2), with interest.

Dorothy Flowers

Flowers was laid off from her press operator position at the North Grand facility on December 4, 1987, at age 60. Following her layoff, she registered for work with, and received unemployment benefits from, Illinois' unemployment office, as well as SUB pay for one year from Respondent. In January 1989, she began receiving pension benefits from Respondent, and 4 months later, when she turned 62, began receiving social security benefits.

Flowers testified that after being laid off and continuing through April 1, 1989, when she applied for Social Security benefits, she continually looked for work by reviewing the want ads in local newspapers and by asking friends for job leads. She claims she made at least two to three job contacts per week. Her search forms show that she searched for work at a variety of places, including hospitals, fast food restaurants, discount chain stores, supermarkets, etc., all without success. Respondent offered no evidence to contradict Flowers' above testimony.

Flowers testified, without contradiction, that had she been permitted to take an IPJO transfer to one of Respondent's other facilities following her layoff, including its Burns Harbor plant, she would have done so. The specification imputes to her a vacancy at the Burns Harbor facility filled by new hire representative Rudy Soucie on August 15, 1988, and alleges her backpay period runs from that date to April 1, 1989, after which she admittedly engaged in a willful loss of earnings (IV:776).

The Respondent disputes Flowers' assertion that she would have accepted an IPJO transfer when laid off in December 1987. It argues that Flowers ceased looking for work in 1989 soon after she began collecting pension and social security benefits, and that since her earnings during 1988 from SUB payments and unemployment benefits were roughly equivalent to what she began receiving in 1989, it is simply not believable that Flowers would have been willing give up these latter payments to return to work at one of its other plants.

Respondent's refusal to believe Flowers' claim about wanting to transfer hardly justifies rejecting her undisputed testimony in this regard. Flowers, in my view, testified in an honest and straightforward manner. The Respondent, on the other hand, produced no evidence to contradict her assertions. Accordingly, I credit Flowers and find that had she been given the opportunity, she would have transferred to Burns Harbor in August 1988. The fact that Flowers ceased looking for work after April 1989, when she started collecting Social Security benefits, does not establish that she would not have accepted an IPJO transfer to Burns Harbor some 8 months earlier. Finally, any doubts in this regard are resolved against Respondent as the wrongdoer, and not against Flowers. *Teamsters Local 469 (Coastal Tank Lines)*, supra.

The Respondent further claims that Flowers should not receive backpay for 1988 or 1989 because she failed to mitigate her damages. It asserts, for example, that Flowers "hardly contacted any factories—the places most likely to have jobs for which she was qualified" (RB:79), and further argues that it simply is not reasonable to believe that each and every employer she claims to have contacted did not have a single vacancy. Respondent's contention is without merit.

Initially, it is not clear just how many factories Flowers may have visited, for while only two factories are listed in her search forms—Dixie Cup Company and Campbell Soup Company—she credibly and without contradiction testified that in filling out her forms in 1994, she was unable to recall, and consequently did not list, all the employers she contacted some 5 to 6 years earlier. Given the passage of time, her inability to recall is readily understandable and cannot be held against her. Thus, while she named only two factories in her search forms, it is quite possible she may have contacted many other factories in her effort to find work. I resolve any doubt in this regard in

Flowers' favor. It is, in any event, the Respondent's burden to produce facts sufficient to support the inference that Flowers did not engage in a reasonable job search, a burden that has clearly not been satisfied here. It has not, for example, produced the name of a single factory that in 1988 or 1989, when Flowers was looking for work, was hiring individuals with her work background and experience, and which would have hired Flowers had she applied. See, e.g., *C-F Air Freight, Inc*., 276 NLRB 481 (1985). Thus, without more, Respondent's mere assertion that Flowers contacted only two factories in her search for work, and its refusal to believe that Flowers could not find work after a year's search, does not support a finding that Flowers did not engage in a reasonable job search, or constitute grounds for denying her backpay.

Finally, the Respondent contends that Flowers' backpay must be tolled for the period January through April, 1989, because she purportedly "acknowledged that she stopped looking for work a few months before she turned 62 and became eligible for Social Security" in April 1989 (RB:80). The Respondent, however, misrepresents Flowers' testimony, for Flowers' testimony is that she continued looking for work up through April 1989, when she reached age 62 and became eligible for Social Security (IV:779). That Respondent understood this to be her testimony is evident from the questions it posed to her during cross-examination (IV:801; 803, 804). Accordingly, I reject Respondent's claim in this regard and find, as testified to by Flowers, that she in fact was engaged in a diligent search for work through April 1989. As the Respondent has not satisfied its burden of showing that Flowers did not diligently look for work during her backpay period or that she otherwise engaged in willful loss of earnings, I find that Flowers is entitled to backpay in the amount of $24,972, as set forth in attachment 8 of the specification, with interest.

Louise Harris

Harris was laid off from her automatic feeder operator position at the Clearing plant on December 18, 1987, at age 60. In October 1994, Harris filled out a questionnaire sent to her by Standish wherein she stated, inter alia, that had she been allowed to transfer to the Burns Harbor facility following her layoff, she would have done so, a claim she reiterated at the hearing (VI:1089). She also filled out Search for Work forms provided to her by Standish wherein she listed the various employers she contacted in her efforts to find work (GCX-27). Her forms, as well as her testimony, reflect that Harris contacted some 3-4 employers per week. Harris testified that she looked at newspaper want ads, made phone calls, visited plants, and inquired of friends in her efforts to find work, and that despite filling out applications with certain employers, she was never called. She also registered for work with the Illinois State unemployment service and was required to report to them every 2 weeks the efforts she made to find work. Harris stopped looking for work when she turned age 62. Attachment 9 of the specification imputes to Harris a vacancy filled by new hire representative Robert King on August 15, 1988, at the Burns Harbor facility, and alleges her backpay period runs from that date to October 31, 1989, when Harris removed herself from the job market.

The Respondent contends that Harris' account of her job search, and her claim that she would have accepted an IPJO transfer to the Burns Harbor facility, should not be credited. I disagree. To be sure, Harris was somewhat of a difficult witness who at times had trouble understanding certain of the questions being posed to her, and often rambled on. Despite these shortcomings, I am convinced Harris tried to answer all questions truthfully and to best of her ability. To the extent her answers seem nonresponsive, I attribute it to nervousness stemming from having to testify in this proceeding, and to the fact that she was being asked to recall events that occurred many years earlier. The Respondent, in any event, has presented no evidence to contradict her above claims about accepting a transfer and her job search efforts, and relies instead on Evans' generalized and highly speculative testimony that given the disincentives for transferring, Harris would not have gone to Burns Harbor. Respondent, however, cannot satisfy its burden of proof by relying on speculation and conjecture. Accordingly, I accept as true Harris' unrefuted testimony that she would have transferred to Burns Harbor following her layoff had she been afforded the opportunity.

I also credit Harris' testimony that in her efforts to find work during the backpay period she contacted on average 3–4 employers per week. That she may have contacted the same employer more than once does not strike me as particularly unusual, as Respondent suggests on brief (RB:81), for an employer that is not hiring one day may very well do so at a later date. Harris' repeated visits to the same employer, it should be noted, were not made every day. Rather, as evident from her search forms, Harris waited several months before going back to an employer she may have previously contacted. While Respondent may doubt that Harris contacted the employers listed in her Search for Work forms and mentioned by her at the hearing, it offered no evidence of its own to contradict Harris' claim that such contacts were indeed made. Respondent's burden's is not to create doubt but to establish by a preponderance of the credible evidence that Harris did not engage in a diligent search for work, and any doubts in this regard are resolved in favor of Harris as the wronged party, rather than the wrongdoer. *Teamsters Local 469 (Coastal Tank Lines)*, supra.

The Respondent also points out on brief that some of the employer contacts made by Harris occurred on her way to and from the State Unemployment office while accompanied by a friend, suggesting that Harris and her friend made these contacts only to satisfy the State Unemployment requirements. The Respondent again offers no support for its assertion and is simply speculating that this was the true motivation behind Harris' visits. Accordingly, I reject it. I note in this regard that Harris testified, credibly and without contradiction, that her employer contacts averaged 3–4 per week. As she reported to the State Unemployment once every 2 weeks, it is patently clear that Harris was engaged in a job search during those times that she was not required to report, thereby undermining Respondent's suggestion that Harris was not seriously looking for work and only interested in meeting the State requirements for unemployment benefits.

In sum, I find that Respondent has not sustained its burden of showing that Harris engaged in a willful loss of earnings by not diligently searching for work during her backpay period. Accordingly, Harris is entitled to backpay in the amount of $30,190, as set forth in attachment 9 of the specification, with interest.

John Hatfield

Hatfield was laid off from his assembly maintainer position at the Clearing plant on December 20, 1987, at the age of 48. Following his layoff, Hatfield reported to the Illinois Unemployment Office and began receiving unemployment benefits as well as SUB pay. In June 1989, when his SUB benefits expired, Hatfield began receiving pension benefits. Hatfield testified that around June 1989, he moved to West Virginia, where he had family, because he "could not afford to live in Chicago and be unemployed" (VII:1265). On October 16, 1994, Hatfield returned the questionnaire sent to him by Standish stating, inter alia, that had he been allowed to take an IPJO transfer to the Derry plant following his layoff, he would have done so (GCX-29), a claim reiterated at the hearing (VII:1225–1226). Hatfield also filled out Search for Work forms listing the names and locations of some of the employers he contacted during his backpay period. He testified that he looked for work by searching the help wanted ads in local newspapers, and generally getting in his car and driving in various directions stopping along the way to inquire of employers he came across of any job openings. He claims he filled out applications but, given the passage of time, could not recall where such applications were filed (VII:1232). Hatfield testified he continued looking for work after moving to West Virginia. The specification imputes to Hatfield the vacancy filled by new hire representative employee, D. Booth, at the Derry facility on April 1, 1988, and alleges his backpay period runs from that date to August 5, 1990, when Booth was terminated, and there was no less senior new hire employee for Hatfield to bump.

The Respondent disputes Hatfield's claim that he would have taken an IPJO transfer to Derry had it been offered to him. In support, it points to testimony by Clearing plant manager, Ronald Proskey and by Supervisor Thomas Panfil, both of whom testified that sometime prior to his layoff Hatfield mentioned to them in separate conversations that he intended to retire once the Clearing plant closed. According to Panfil, Hatfield told him in August 1987, that the Elgin plant was too far for him, that he already had the "magic points" needed to collect his pension, and that he intended to open up a gas station (XI:2111). Proskey testified that in July or August 1987, during a union-management meeting to discuss the Clearing/North Grand closing, he asked Hatfield (a union official) what he intended to do once the plant closed, and that Hatfield responded he had just bought some property in West Virginia and had come into some money (one-half million dollars), and planned to retire and "enjoy the fruits of his bonanza." A similar conversation occurred some 2 or 3 weeks later, according to Proskey, during which Hatfield reiterated his intention to retire and enjoy himself (XI:2081–2082). The Respondent also points to notations found in Hatfield's questionnaire and search forms stating he "retired" in June 1989 (See GCXs-29; 31). These facts, the Respondent contends, contradict Hatfield's claim that he would have transferred to another facility following his layoff. I disagree.

Assuming the truth of Panfil's and Proskey's assertion that Hatfield expressed to them his intent to retire once laid off, his testimony at the hearing, bolstered by his Search for Work forms, shows that Hatfield, in fact, did not retire but instead began looking for work immediately after being laid off by contacting some 8 to 10 employers per week, and continued to do so through at least August 5, 1990. The Respondent offered no evidence to contradict Hatfield's testimony in this regard. The Respondent further contends, however, that Hatfield's search efforts were designed to comply with the State Unemployment Office's requirement that he make at least three contacts per week and that he was not truly interested in obtaining work. Again, it presents no facts to support its contention, and is simply speculating as to the true motivation behind Hatfield's job search. If, as suggested by Respondent, Hatfield was only seeking to comply with the State's job search requirements, he could have limited his employer contacts to three per week. However, Hatfield's testimony that he made 8t to 10 employer contacts per week, which was not disputed by Respondent, suggests that Hatfield was truly interested in obtaining full employment and was not simply going through the motions.

The Respondent attacks Hatfield's credibility by noting that Hatfield could only recall having filed just one job application during his entire search. This is not an accurate representation of Hatfield's testimony. Hatfield, for example, never testified to having filed only one job application during his backpay period. Rather, his testimony is that he could only recall from memory having filed a job application and gotten an interview with an O'Henry Candy Company. He also recalled having filed a job application with the Mingo County Sheriff's Department, in West Virginia. His inability at the hearing to recall off the top of his head the names of any other employers he might have filed applications with, given the 7–8 years passage of time, is understandable and cannot be held against him. If the Respondent was truly interested in ascertaining whether or not Hatfield had filed applications elsewhere, it could have shown him his Search for Work forms to refresh his recollection. Instead, the Respondent insisted that Hatfield answer this particular question from memory, something which, as noted, was understandably difficult for him to do (VII:1269). Thus, I find no basis for rejecting Hatfield's testimony simply because of his inability to recall the specifics of his job search.

The Respondent further contends that it is simply not plausible to belief that every employer Hatfied contacted was not hiring, as Hatfield stated in his Search for Work forms, and that it is more reasonable to believe that "at least some of the employers he contacted would have had openings" (RB:66). However, to sustain its burden in a compliance proceeding, the Respondent must do more than simply speculate that there were job openings available. Rather, it must come forth with specific facts showing which of the employers visited by Hatfield was actually hiring, and that Hatfield was offered but refused to accept employment. *Arlington Hotel Co*., 287 NLRB 851, 852 (1987); *O.K. Machine & Tool Corp*., 279 NLRB 474, 478 (1986), *Matlock Truck & Body Trailer Corp*., 248 NLRB 461, 479 (1980); *Browning Industries*, supra. The Respondent has not done so here. Further, Respondent's personal belief that Hatfield did not want to find work because he was receiving SUB and unemployment benefits, is nothing more than a statement of opinion, and not proof that Hatfield did not diligently search for work. Accordingly, I find that the Respondent has not carried its burden of showing that Hatfield engaged in willful loss of earnings at any time during his backpay period. Consequently, Hatfield, I find, is entitled to backpay in the amount of $79,471., as set forth in attachment 10 of the specification, with interest.

Frances Hawkins

Hawkins was laid off from her seamer operator position at the Clearing plant on December 18, 1987, at age 61. She then

reported to the Illinois State Unemployment Service and began receiving State unemployment benefits, along with SUB payments from Respondent for 1 year. On January 1, 1989, following expiration of her SUB benefits, Hawkins started receiving a pension. She testified that following her layoff, she looked for work at least three times per week in the Chicago area, until September, 1989, at which time she moved to Las Vegas, Nevada. While in Chicago, Hawkins claims she looked for work by reviewing the want ads in the Chicago Sun Times newspaper, obtaining job leads from family and friends, making phone calls to various employers, and personally visiting others, some of which allowed her to file applications, while others did not (IX:1776). Hawkins concedes she did not immediately look for work on arriving at Las Vegas because she was unfamiliar with her surroundings and because her car had not yet arrived from Chicago. Although she eventually found work in September 1991, with Las Vegas Janitorial Service, Hawkins further admits that from the time she arrived in Las Vegas until she acquired her janitorial service job, she did not look for work (IX:1849).

Hawkins stated, first in the questionnaire sent to her by Board Agent Standish and again at the hearing, that had she been allowed to take an IPJO transfer to another of Respondent's facilities, including the Burns Harbor plant, following her layoff, she would have done so, and would in all likelihood have still been in Respondent's employ as of the date of the hearing. The specification imputes to her a vacancy filled by new hire representative employee Branson Cullimore at Burns Harbor on June 27, 1988. It alleges that her backpay period runs from June 27, 1988, to October 21, 1991, at which point Hawkins removed herself from the labor market,[20] but computes no backpay for Hawkins for the period between September 1, 1989, when she moved to Las Vegas, and September 1, 1991, when she found work with the janitorial service, on grounds she engaged in a willful loss of earnings during that period. However, because Hawkins returned to the job market after September 1, 1991, the specification imputes to her Cullimore's earnings from that date to October 21, 1991 (GCX-2A).

The Respondent contends that Hawkins' testimony, that she would have accepted an IPJO transfer to Burns Harbor in June 1988, should not be credited because it finds it difficult to believe Hawkins would have done so given the long commute to and from the Burns Harbor plant she would have to make, and because she would have lost her SUB benefits by accepting the IPJO transfer. Its belief in this regard, however, is pure speculation and not based on any evidence of record. When asked how she would handle the commute, Hawkins testified, without contradiction, that she had never given it much thought as no offer was ever made to her, but that her intent, if allowed to do so, was to obtain and share an apartment with others in the Burns Harbor vicinity during the winter months, and during the warmer months she might drive back and forth (IX:1836–1837). She further testified without contradiction that she would have preferred working at Burns Harbor even if meant losing her SUB pay. While far from the perfect witness, I am convinced Hawkins testified in a truthful manner, and that any inconsistencies or recall problems in her testimony stemmed not from any intent to deceive but rather from a poor memory caused by the passage of time. Accordingly, I credit her uncontradicted testimony and find that had Respondent provided her with an opportunity to transfer to Burns Harbor in 1988, she would have done so.

The Respondent further argues that Hawkins, in any event, failed to mitigate her damages because she admits making only two to three job contacts per week, an amount it claims was insufficient to qualify for Illinois State Unemployment benefits. It also argues, somewhat inconsistently, that Hawkins' 1988 job search was calculated to satisfy the criteria for receiving State unemployment benefits, and not to find actual employment (RB:84). As to former, the Respondent is clearly mistaken that Hawkins' job search was insufficient to satisfy the state requirements for unemployment for it is undisputed that Hawkins indeed received unemployment compensation. As such, she was obviously in full compliance with the state requirements, for had she not been, it is unlikely she would have received any such benefits. Nor would she have received SUB pay, as the receipt of these latter benefits was made contingent on the receipt of unemployment benefits (IX:1799). The Respondent does not contend otherwise.

Nor has Respondent presented any facts to support its claim that Hawkins' 1988 job search was perfunctory in nature and conducted without any real intent to find employment. It points only to the fact that in her 1988 Search for Work forms, Hawkins identified no more than nine employers for the entire year. However, Hawkins, as noted, credibly testified that she made at least two to three contacts per week, obviously many more than the nine or so she identified in her search form. Hawkins failure to list any more than the nine was obviously due to her poor memory caused by the passage of time. She claims in this regard that while she had kept records of her job searches, these were destroyed when the truck carrying her possessions in her move from Chicago to Las Vegas was involved in an accident. Hawkins tried to reconstruct her job search by contacting a Chicago friend, Martha Giles, who had accompanied her during some of her visits to employers, to find out if she had kept records of her own. Giles did in fact have some records and it was this information that Hawkins included in her 1988 search form. The Respondent has offered nothing to refute Hawkins' above claims, and consequently has not shown that Hawkins was not engaged in a serious search for work effort.

The Respondent further argues that Hawkins "retired" in January 1989, and consequently, should not receive backpay for any period after that date. In support thereof, the Respondent points to Hawkins affirmative response to its counsel's query of whether she began receiving a pension and "retired" when her SUB pay ran out in January 1989 (IX:1799–1800). The Respondent, however, conveniently ignores Hawkins' further assertion that she did not ask for retirement but rather had it thrust upon her by Respondent following expiration of her SUB benefits, and that she had no choice in the matter (IX:1796). Hawkins' latter testimony makes clear that she had no intentions of retiring in January 1989, and her further undisputed claim that she continued looking for work through September 1, 1989 (IX:1771–1772), provides convincing evidence that she did not deem herself to be "retired." Accordingly, I find no merit to Respondent's claim that Hawkins "retired" in January 1989. *Hansen Bros. Enterprises*, 313 NLRB 599, 608 (1993).

[20] Hawkins reached age 65 on October 21, 1991. Although Hawkins testified she would have continued working beyond that date, the Specification tolls backpay as of October 21, 1991, consistent with Hawkins' statement in a sworn affidavit to the Board that she would have worked to age 65 (IX:1843).

The Respondent also contends that Hawkins should receive no backpay for the third and fourth quarters of 1991 because in an affidavit given to the Board she admitted she "was not actually searching for work when in 1991," the rental agent of her apartment complex mentioned to her that Las Vegas Janitorial Service was hiring (RX-96). I disagree. There is no disputing that from September 1, 1989, to September 1991, Hawkins engaged in a willful loss of earnings. This, as noted, was acknowledged by the General Counsel in the second amended attachment 11 of the specification and, as noted, conceded by Hawkins at the hearing as well as in her affidavit. However, there is also no disputing that Hawkins did obtain employment in September 1991, with Las Vegas Janitorial Service, and remained so employed beyond the October 21, 1991, end date of the alleged backpay period Thus, while having incurred a willful loss of earnings prior to September 1, 1991, Hawkins clearly mitigated her damages after that date and continued to do so throughout the remainder of her backpay period. The fact that Hawkins may not have been actually engaged in a job search when told of the job possibilities with Las Vegas Janitorial Service can hardly serve as a basis for denying her backpay for the period after September 1, 1991, for regardless of what may have occurred prior to September 1, 1991, Hawkins unequivocally placed herself back in the job market and diligently renewed her job search when she followed up on the rental agent's job lead, and thereafter applied for and accepted employment with the janitorial firm.

To summarize, the Respondent has not shown that Hawkins failed to diligently search for work or otherwise incurred a willful loss of earnings during the backpay period alleged in the second amended attachment 11 of the specification. Accordingly, I find that Hawkins is entitled to backpay in the amount of $49,524, as set forth in said attachment, with interest (GCX-2A).

Tom Husul

Husul was laid off from his machine operator position at the Passaic facility on September 2, 1988, at the age of 41, after which he began receiving SUB and unemployment benefits. In October 1994, Husul filled out the questionnaire sent to him by Standish in which he stated, as he did at the hearing, that he would have accepted an IPJO transfer to the Derry facility had it been offered to him. He also completed Search for Work forms in which he listed some of the employers he contacted during his backpay period. He testified that not all the employers contacted are listed in the search forms because he simply could not recall in 1994 all the contacts made several years earlier. The specification imputes to him the vacancy filled by new hire Representative E. Mosonyi at the Derry facility on October 3, 1988. Following Mosonyi's termination on June 17, 1990, Husul, according to the specification, would have bumped less senior new hire E. McGratty. Husul's backpay period is alleged to run from October 3, 1988, until October 14, 1990, when McGratty was terminated, after which there was no less senior new hire representative that Husul could have bumped.

Husul claims that following his layoff and continuing through October 14, 1990, he searched for work "just about every day," and that he did so by personally going out to different locations, looking through newspapers and other local periodicals, and asking relatives, friends, and neighbors for job leads. Regarding the number of "cold calls" he made on employers, Husul stated he did this at least three times a week.

While questioning Husul's claim that he would have taken an IPJO transfer to Derry, the Respondent produced no evidence to refute it. Instead, it attempts on brief (RB:43–44) to improperly shift the burden to Husul to provide a "logical reason" for wanting to transfer to Derry. It was not Husul's burden to do so. Rather, it was the Respondent who, as part of its effort to reduce its backpay liability, bore the burden of affirmatively establishing through the production of credible evidence that Husul would not have transferred to its Derry facility, a burden clearly not sustained here. Indeed, not only did Respondent fail to produce any hard evidence to support its claim, it also made no effort to refute Husul's testimony that he specifically asked Respondent's plant manager for an IPJO transfer to another of its facilities, including Derry, but was turned down (VIII:1515-1516). Husul, it should be noted, had had prior experience with an IPJO transfer. Thus, in 1986, he took an IPJO transfer from a North Collins facility to the Passaic plant, from which he was eventually laid off, a distance of some 400 miles. Husul did not relocate but instead commuted on weekends from his Collins home to his Passaic job, sometimes driving 7 hours to the facility, and at other times going by plane. Husul was a credible witness who, I am convinced, testified truthfully and honestly. Consequently, I accept as true his above claims, and accordingly reject Respondent's propensity claim. I find instead that Husul would have gone to Derry had he been allowed to do so.

The Respondent's argument with respect to Husul's mitigation efforts is equally devoid of merit. It asserts, for example, that while claiming to have visited at least three employers per week during the backpay period, Husul's Search for Work forms show only "two to four employers" contacted per quarter (RB:44). However, Husul credibly explained that he did not list all the contacts made, and the ones he did recall and included in his search forms were memorable because they were among the higher paying positions he applied for. Given the passage of time between his 1988–1990 job search, and when Standish in 1994 asked him to recount the specifics of that search, it is understandable that Husul would not have been able to recall the names of all the places he visited.

Finally, while Respondent finds it hard to believe that Husul was unable to find work despite a lengthy job search, its doubts alone are not enough to justify a finding that Husul did not engage in a reasonable job search or to deny him backpay. As previously noted, to prevail on its mitigation claim, the Respondent must affirmatively establish by a preponderance of credible evidence that Husul did not search for work or engaged in a willful loss of earnings. Having failed to do so, I find that Husul is entitled to backpay in the amount of $55,062, as alleged in attachment 12 of the specification, with interest.

Boleslaw (Bill) Kmic

Kmic was laid off at age 59 from his Sheer Maintenance and Operator position at the Clearing plant on December 30, 1987, after which he began collecting state unemployment benefits, along with SUB payments from Respondent. When his SUB benefits expired in January 1989, Kmic began receiving pension benefits. Kmic testified, consistent with statements made in his questionnaire, that he would have taken an IPJO transfer to one of Respondent's other facilities, including the Burns Harbor plant, following his layoff had he been allowed to do so,

worked until he reached age 65, after which he would have retired. The Specification imputes to Kmic a vacancy filled by new hire representative employee, Ken Smith, on April 17, 1989, at Burns Harbor, and alleges that his backpay runs from that date until August 1, 1990, when Kmic states he would have retired.

Kmic claims he began looking for work soon after being laid off, and did so through August 1990, without success, by poring through the help wanted ads in local newspapers every day and making calls to different employers, personally visiting employers and filling out job applications, and by asking friends for job leads. He averaged from three to four job contacts per week. In 1995, Kmic filled out and returned to Board Agent Standish Search for Work forms in which he listed some of the employers he contacted during his backpay period, but explained that due to an inability to recall, the forms do not contain the names of all the places he contacted. Although he had maintained records of his job searches, Kmic claims that most were eventually thrown out, and the only records he still had were those for which entries were made on his search forms.

While it disputes Kmic's claim about wanting to transfer to Burns Harbor following his layoff, the Respondent offers nothing in the way of evidence to contradict it. Rather, it simply assumes, notwithstanding Kmic's assertion to the contrary, that Kmic would not have wanted to commute the long distance from his home to the Burns Harbor plant, or to work for earnings that would be only slightly more than what he was already receiving in SUB and unemployment benefits. However, Respondent's mere suspicion or belief that Kmic might not have transferred does not, without more, constitute sufficient grounds for denying backpay to Kmic. Thus, to avoid its backpay liability, the Respondent must produce facts sufficient to support such inference, which it clearly has not done here. As for Kmic, I am persuaded by his demeanor that he testified in an honest and forthright manner, notwithstanding any minor inconsistencies that may be found in his testimony. Accordingly, I credit his testimony and find that he indeed would have transferred to the Burns Harbor facility but for Respondent's unlawful discontinuance of the IPJO program.

Respondent further suggests that Kmic only checked off the box labeled "Burns Harbor" in order to get backpay. To be sure, Kmic, as the Respondent correctly points out, responded "yes" when asked if he understood that checking off the box made him eligible for backpay. However, I find nothing in this simple response to contradict Kmic's testimony on direct examination that he would have taken an IPJO transfer to the Burns Harbor plant had he been allowed to do so. Rather, Kmic's answer, in my view, reflects nothing more than his awareness of the fact that he might be eligible to receive backpay by virtue of having been denied an opportunity to go to Burns Harbor. Kmic readily admits that he had no idea what, if any, backpay he stood to receive by checking off the boxes, or whether the amount of backpay would vary depending on the number of boxes checked (IX:1895). Accordingly, I find no support for Respondent's implicit suggestion that Kmic was not being truthful in stating he would have gone to Burns Harbor, and that he checked off that particular box because he knew he could get backpay by doing so.

As to Kmic's mitigation efforts, the Respondent concedes that Kmic made reasonable attempts to mitigate damages during the second, third, and fourth quarter of 1989, but contends that no backpay is due for the first, second, and third quarter of 1990, because Kmic by then regarded himself as "retired" as shown on his 1989 tax return dated March 27, 1990 (IX:1890). Kmic, however, explained that despite listing himself as "retired" on his 1989 tax return, it was not by choice because he did not want to be retired, suggesting implicitly that he was "forced" to classify himself as such by Respondent's actions (IX:1894). That he did not consider himself retired is evident by his further undisputed testimony that he remained in the job market and continued looking for work through August 1990 (IX:1860). I credit Kmic's testimony in this regard and find that he had not retired from all employment during the first, second, and third quarters of 1990, as argued by Respondent. Hansen Bros. Enterprises, supra. As the Respondent raises no other claim regarding Kmic's mitigation efforts, I find that it has not satisfied its burden of showing that Kmic did not engage in a reasonable job search or engaged in a willful loss of earnings during his backpay period justifying a reduction or elimination of his backpay. Accordingly, I find that Kmic is entitled to backpay in the amount of $24,294, as set forth in attachment 13 of the specification, with interest.

Eddie Lewis

As previously discussed, Lewis was laid off from his position at North Grand on October 26, 1987. His backpay period is alleged to run from his layoff date to January 6, 1991, when the last individual he could have bumped under IPJO, e.g., Derry plant new hire representative P. Fiest, was laid off. Following his layoff, Lewis reported to the State Unemployment Office and began receiving unemployment benefits which continued for 9 months. He was also required to search for work several times a week and to provide that office with records of his search efforts every 2 weeks. Lewis testified, without contradiction, that he contacted at least four employers per week, obtaining sources from the Illinois State Unemployment Office and through want ads in the local newspapers, and that he turned over his search records to the State office every 2 weeks, as required. He did not, however, keep copies of those records. In addition to unemployment benefits, Lewis received SUB pay for 1 year from Respondent, after which he began collecting a pension. Lewis claims he searched for work comparable to what he had with Respondent, and continued to do so without success until April 1989, when he finally took a full-time security job with ELA Security. In October 1992, Lewis was rehired by Respondent at its Burns Harbor plant as a fork lift operator (X:1976). He nevertheless retained a part-time position at ELA Security.

Lewis testified that when he received the questionnaire and Search for Work forms in late 1994 from Board Agent Standish, he was unable to recall any of the places he may have contacted during his search for work, and that his effort to obtain the names of such employers from records he submitted to the State unemployment office was unsuccessful as such records were only maintained for 3 years. Consequently, he returned the blank Search for Work forms to Standish with the above explanation.

The Respondent raises no "propensity to transfer" issue with respect to Lewis (RB:76). It does, however, raise certain issues regarding his mitigation efforts. It argues, for example, that Lewis failed to mitigate damages between his layoff date and the fourth quarter of 1988, when his SUB benefits ran out, citing in support thereof the fact that Lewis did not list the name

of a single employer he contacted during that period. It argues that his failure to identify even one employer on his search forms while claiming to have made four employer contacts per week is simply not credible. I disagree.

While Lewis was unable to recall which employers he may have contacted and failed to maintain records of his job searches, his poor memory and lack of recordkeeping does automatically disqualify him from receiving backpay. *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), citing to *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966), affd. 395 F.2d 241 (1st Cir. 1968). Lewis, as noted, testified without contradiction, and credibly in my view, that he had indeed recorded the dates and places of employers he contacted during his unemployment period, and had turned such records over to the state unemployment office, as he was required to do. His failure to maintain such records should not be held against him, particularly as there is no evidence that Lewis or, for that matter, any of the other discriminatees, was ever instructed to do so, or advised that such records might be needed for compliance purposes should the General Counsel prevail.

Further, it is reasonable to expect that Lewis' memory of his job searches would have faded given the 7 years passage of time between his layoff date in 1987, when he began his search for work efforts, and 1994, when he was asked by Standish to recreate his search-for-work efforts. From a demeanor standpoint, I found Lewis to be a wholly credible witness and am convinced he testified to the best of his recollection in an honest and straightforward manner. I therefore credit his testimony and find that he searched for work in the manner described by him, and that he averaged four employer contacts per week. The Respondent, who bears the burden of showing that Lewis did not engage in any job search prior to being hired by ELA Security, has not done so. Accordingly, its claim that Lewis engaged in a willful loss of earnings from his layoff date to April 1989, when he was hired by ELA Security, is found to be without merit.

Equally without merit is Respondent's assertion that by taking the ELA Security job which paid substantially less than what he had been earning before being laid off, Lewis "lowered his sights too soon," making him ineligible for backpay from April 1989 forward. Respondent's argument is premised on the "lower sights" doctrine which holds that after being unable, over a reasonable period of time, to find the kind of employment to which the employee is accustomed, the latter should lower his sights and accept employment even at a lower rate of pay than the employee earned at his regular job. *Delta Data Systems Corp.*, 293 NLRB 736, 738 (1989), quoting from *NLRB v. Madison Courier*, 505 F.2d 391, 395 (D.C. Cir. 1974); see also *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 456 (3d Cir. 1992). In raising this argument, the Respondent misstates the facts by asserting on brief (p. 77) that Lewis "had only been working for approximately five months when he took the ELA security job" (RB:77). The record makes clear that prior to obtaining employment with ELA Security, Lewis had not worked at all since being laid off on October 26, 1987, a period of almost a year-and-a-half. During that period of time, Lewis, as found above, was diligently looking for work comparable to what he had been doing for Respondent. Only after his year-and-a-half effort to find such comparable work proved fruitless did Lewis lower his sights and accept a lower-paying job outside his field as a security guard with ELA Security. While the parameters of what constitutes a "reasonable period of time" are not clearly defined, Delta Data Systems Corp., supra, there is no doubt in my mind, and I so find, that Lewis' year-and-a-half diligent search for work clearly meets that criteria. In fact, had Lewis not taken the security job and continued his job search, the Respondent would in all likelihood have accused Lewis of incurring a willful loss of earnings. In summary, I find, contrary to Respondent, that Lewis did not lower his sights prematurely when he accepted the ELA Security position.

Finally, the Respondent's further argument on brief, that the specification does not take into account Lewis' 1989 interim earnings with ELA Security (RB:77), is simply wrong. Following Lewis' testimony during which it was brought out that these interim earnings had not been included in Attachment 14 of the specification, the General Counsel amended the specification to include such earnings, resulting in a reduction in the amount of backpay owed to Lewis (GCX-2[b]). Accordingly, I find that Lewis is entitled to backpay in the amount of $78,642., as set forth in the second amended attachment 14 to the specification (GCX-2B),[21] and vacation pay in the amount of $3588, as set forth in attachment 32 of the specification, with interest.

Dwight McLaurin

McLaurin worked at the Clearing plant until laid off on February 10, 1989, at age 56. Following his layoff, McLaurin received unemployment compensation as well as SUB pay for 1 year. On March 1, 1990, after his SUB benefits expired, McLaurin started receiving pension benefits. The specification does not allege any backpay for McLaurin as the General Counsel admits he engaged in a willful loss of earnings. It does, however, allege that McLaurin would have transferred to Burns Harbor following his layoff, a claim made by McLaurin at the hearing and in his 1994 questionnaire to Standish. Thus, he testified he would have accepted the transfer at any point following his layoff, and would have worked until age 62, in 1995 (VIII:1619). The specification imputes to him the vacancy that would have resulted at Burns Harbor when discriminatee Pearson retired on February 1, 1993. The General Counsel therefore alleges that McLaurin's backpay period begins February 2, 1993, and continues to run until he receives a valid offer of reinstatement from Respondent (GCX-2, amended attachment 15), and remains entitled to additional pension credits for his entire backpay period. I agree.

Initially, McLaurin's testimony that he would have gone to Burns Harbor if allowed under the IPJO program is credited, as I am convinced he testified in an honest and truthful manner. The Respondent has, in any event, produced no evidence to contradict his claims, and instead relies on personal doubts, speculation, and conjecture to support its burden of proof. Thus, I find that, as alleged in the specification, McLaurin would have accepted an IPJO transfer to Burns Harbor in Feb-

[21] In his posthearing brief (p. 50), the General Counsel erroneously shows Lewis' backpay to be $94,016., the amount claimed in the first amended attachment 14 (GCX-2). As noted, attachment 14 was amended a second time at the hearing (XI:2057–2058), after Lewis finished testifying, to show the backpay amount to be as found herein, e.g., $78,642. This amendment took into account Lewis' 1989 earnings from ELA which the the General Counsel inadvertently failed to include in Lewis' calculations in preparing the specification. It further renders moot Respondent's argument on brief (p. 77) that said amounts must be deducted. It appears that both the General and the Respondent missed this amendment when preparing their respective briefs.

ruary 1993, and filled the position left vacant by the retirement of discriminatee Pearson. Moreover, while not eligible for backpay, McLaurin nevertheless remains a discriminatee and, under the Board's Order, is entitled to be made whole for any other losses he may have suffered as a result of Respondent's unlawful discontinuation of the IPJO program, including any additional pension credits that would have accrued to him following his reemployment at the Burns Harbor plant on February 2, 1993. The Respondent claims that McLaurin cannot be credited with additional pension service because his backpay period has no "end date," making it impossible to measure the amount of pension service that might be due him. I see no difficulty in this regard, for McLaurin readily admits he would have worked until he reached age 62, on May 1, 1995. Consequently, I find McLaurin is entitled to be credited with additional pension service for the period beginning February 2, 1993, and ending May 1, 1995.

Carl Menhennet

Menhennet was laid off from his line maintainer position at the Passaic plant on September 2, 1988, at age of 54, and began receiving SUB payments as well as New Jersey State unemployment benefits. When his SUB payments ran out in September 1990, Menhennet became collecting a pension. He testified that had he been given an opportunity to transfer to another facility following his layoff, he would have done so, and would have worked until age 65. The specification imputes to him a vacancy filled by new hire representative J. Proulx on October 11, 1988, at the Derry plant, and alleges that he is entitled to backpay for the period October 11, 1988 through October 14, 1990, when Proulx was terminated and there was no other less senior new hire representative that Menhennet could have bumped (attachment 16).

Regarding his search for work efforts, Menhennet claims he searched the want ads in his local newspaper every morning for jobs, and when he came across an ad that interested him, he would go and fill out an application. At times, he would take the application with him and after filling it out, he would send it back with a copy of his resume. He made at least three contacts per week, as required by the State unemployment office. In October 1994, Menhennet received the Search for Work forms from Standish, and returned them with an explanation that he simply could not recall the names of the employers he had visited several years earlier. At the hearing, he again was unable to recall the names of employers he may have contacted during the backpay period. He did, however, note that he had worked, albeit for a brief period of time, in January 1989, for a Steinen Mfg. Co, and had obtained employment with the Parsippany, New Jersey Board of Education in January 1990.

While disputing Menhennet's testimony that he would have transferred to Derry if allowed to do so, the Respondent presented no evidence to refute it, and would have me reject it solely on grounds that presumably would have made no economic sense for Menhennet to want to transfer. Respondent's argument is nothing more than speculation and conjecture and is therefore rejected. Rather, I credit Menhennet's undisputed testimony that he would have accepted a transfer to the Derry facility regardless of any benefits he might have received following his layoff.

Also without merit is Respondent's assertion that Menhennet should receive no backpay for the second, third, and fourth quarters of 1989, because while claiming to have made at least three job contacts per week during his entire backpay period, he was unable to recall the name of a single employer he contacted during any of the above-mentioned quarters. I find nothing particularly unusual or suspicious in Menhennet's inability to recall in 1994, the name of even one employer he may have contacted some 5 years earlier in 1989, for that 5-year lapse of time would obviously have caused Menhennet's memory to fade. *Laredo Packing Co.*, 271 NLRB 553 (1984). As stated, a discriminatee's poor memory will not automatically disqualify him from receiving backpay. *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996). Here, there is no evidence that Menhennet's failure to list the names of employers he contacted during his backpay period was the product of deception. Rather, his testimony which I credit, and notations found in his Search for Work forms, make clear that his failure to name the contacts made was caused by a poor memory. Moreover, Respondent's suspicion that Menhennet may not have engaged in a diligent job search during the latter three quarters of 1989, will not suffice to carry its burden of proving a willful loss of earnings. *Laidlaw Corp.,* 207 NLRB 591, 594 ((1973), enfd. 507 F.2d 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1975).

In summary, the Respondent here has not shown that Menhennet did not search for work during the last three quarters of 1989, or that, if he had, his efforts were unreasonable. At most, Respondent has only shown that Menhennet had difficulty recalling the specifics of his job search during that period. Accordingly, I find that Menhennet is entitled to backpay in the amount of $47,004., as alleged in attachment 16 of the compliance specification, with interest.

John Misiora

Misiora was laid off from his maintainer position at the Passaic plant on September 23, 1988, at age 61. Following his layoff, Misiora registered with the State Unemployment Office and received unemployment benefits for 6 months. He testified he was required to look for work and report his efforts to the unemployment office in order to receive such benefits. Misiora also received SUB pay from Respondent for 1 year, after which he began collecting a pension. In May 1989, at age 62, Misiora began collecting social security benefits. Nevertheless, he testified that he continued looking for work after receiving such benefits because he wanted to get the vision and dental insurance benefits he lost when he was laid off by Respondent (IX:1927). He stated that had he been given an opportunity to transfer to another facility, including the Derry plant, following his layoff he would have done so, and noted that a few months prior to being laid off, he asked for a transfer to another facility but was told Respondent was only transferring management personnel. The Specification imputes to him a vacancy at the Derry plant filled by new hire representative employee J. Ferguson on October 3, 1988, and alleges that when Ferguson was terminated on January 15, 1989, Misiora would have bumped less senior new hire employee A. Cochran from his Derry position. It further alleges that Misiora's backpay period runs from October 3, 1988, to December 31, 1990, when Cochran was terminated and at which point there was no other less senior new hire employee that Misiora could have bumped.

Misiora testified he began looking for work soon after his layoff and did so throughout his entire backpay period by searching through want ads in local newspapers, asking and obtaining job leads from friends at his American Legion Post No. 1, and by driving around from place to place inquiring

about work. He recalls filling out numerous job applications, and claims to have made at least four to five job contacts per week (IX:1925–1926).

The Respondent argues that given his 61 years of age at the time of his layoff, it would not have made economic sense for Misiora to transfer to Derry, particularly since he was receiving SUB and State unemployment compensation totaling 70 percent of his prelayoff earnings. Nor, it further claims, would it have made sense after those benefits expired because by then he was receiving a pension along with social security benefits (RB:48). The Respondent also doubts Misiora's claims that if allowed to transfer, he would have rented a place near the Derry plant and remained there for 4 years. The Respondent, however, produced no facts to support its above claims nor to contradict Misiora's testimony that he would have gone to Derry if given the opportunity. Its arguments therefore are nothing more than speculation and conjecture and do not constitute proof that Misiora would not have transferred to Derry, much less grounds to deny him backpay. While Misiora seemed at times confused in his answers, his testimony about wanting to transfer following his layoff, and about having asked for such a transfer prior to his layoff was both credible and unrefuted. Accordingly, I find Misiora would indeed have transferred to Derry following his layoff.

The Respondent also contends that Misiora's job search was inadequate because his search forms show he only made a few contacts per calendar quarter. It asserts that the search forms are inconsistent with Misiora's claim at the hearing that he made five to seven contacts per week. While not questioned about this apparent inconsistency at the hearing, in a sworn affidavit he gave to the Board in April 1995, Misiora did explain that his search forms do not include all the places he may have contacted during his backpay period (RX-104). Although Misiora did not explain why he did not list all his job contacts, it is not unreasonable to believe that Misiora, like most other discriminatees, was unable to recall in 1994, the names of all the employers he may have contacted some several years earlier. Thus, I find no inconsistency between Misiora's search forms and his sworn affidavit, and his failure to proffer this explanation at the hearing was, as noted, was due to the fact that he was never asked to explain.

The Respondent also has difficulty believing that Misiora actually contacted the employers listed on his search forms (RB:49), suggesting implicitly that Misiora may have fabricated his job search forms. It notes in this regard that Misiora provided a confused account as to how the forms were filled out. Admittedly, Misiora's testimony as to how the forms were filled out was slightly muddled, for while stating on the one hand that he made certain of the entries himself, he also suggested that he might have gotten some help from his son and/or wife. However, I am convinced from my observation of his demeanor that Misiora's purported confusion was the product of a poor memory, and not deception, as proposed by Respondent. That Misiora could not remember if he himself filled out the forms or whether he got some assistance from his son and/or wife does not, in my view, negatively affect Misiora's claim that the entries shown in the search forms represent some of the job contacts made by him during the backpay period.

The Respondent, as previously noted, cannot simply rely on impeaching testimony to sustain its burden of proof, but rather is required to prove that Misiora in fact did not look for work. Here, the Respondent has not shown that Misiora did not contact any of the employers listed in his search forms or that he was offered and declined to accept employment. As such, the Respondent has not satisfied its burden of proving that Misiora failed to mitigate his damages at any point during his backpay period. Accordingly, Misiora is entitled to backpay in the amount of $66,820, as set forth in attachment 17 of the specification, with interest.

Gerald Owens

Owens was laid off from his mechanic's position at the Passaic facility on September 23, 1988, at the age of 46, after which he collected New Jersey State unemployment compensation for 6 months, and SUB pay from Respondent for 1 year. Towards the end of 1989, when his SUB pay ran out, Owens began receiving pension benefits. In a questionnaire provided to him in 1994 by Board agent Standish, and in his testimony at the hearing, Owens stated that had he been given the opportunity following his layoff to transfer to another of Respondent's facilities, including the Derry plant, he would have done so. The specification first imputes to him a vacancy filled by new hire representative G. Emery at the Derry plant on October 3, 1988, and asserts that following Emery's termination on August 6, 1989, Owens would have bumped less senior new hire R. Jenkerson who was hired April 22, 1990. It alleges that Owens backpay period runs from October 3, 1988, to January 6, 1991, when Jenkerson was terminated, and after which there was no other new hire representative that Owens could have bumped.

Owens testified that he began looking for work soon after being laid off, and continued doing so through at least January 1991, and did so by using the New Jersey Manufacturing Guide at the local library to identify local employers that employed machinists and then fowarding his resume to them, seeking job leads from friends and relatives, searching through newspaper want ads, and utilizing the employment services of the New Jersey State unemployment office. He claims he averaged some five to seven job contacts per week. In 1994, Owens filled out and returned to Standish Search for Work forms listing some of those contacts, and admitted at the hearing that when filling out the forms in 1994, he could not recall all the places he visited or otherwise contacted between 1988 and 1991, and consequently his search forms do not include all contacts made. Owens did find employment in October 1989, as a "prototype machinist" with a Gilian Company, working a $15 per hour/30-hour week. However, when informed on or about April 12, 1990, that he would have to take a $3-per-hour salary cut, Owens quit to find more suitable employment. He remained unemployed until mid-December 1990, when he again found work as a job shop mechanic with DI-EL Machine Company, where he remained for a little over a year.

The Respondent seeks to undermine Owens' claim about his willingness to take an IPJO transfer by pointing to the fact that in 1979, while employed by Continental Can, Owens was laid off and refused an IPJO transfer to another facility. It argues that Owens' refusal to transfer in 1979 is evidence that he would not have taken an IPJO transfer when laid off by Respondent in September 1988. Owens, however, explained that he regretted not having taken the 1979 IPJO transfer because he spent the next 4 years trying to find suitable employment. Thus, his unsuccessful attempts to find work following his 1979 experience would, if anything, have served to convince Owens to take an IPJO transfer when he was laid off in 1988.

The Respondent further argues that given the SUB and unemployment benefits Owens began receiving immediately following his layoff, and the pension benefits he stood to receive on expiration of his SUB payments, it would not have been a "smart economic choice" for Owens to accept an IPJO transfer (RB:52). The Respondent also questions whether Owens would have wanted to move given that he had school-aged children, and his wife was still employed. While theoretically appealing, Respondent's arguments amount to nothing more than speculation and conjecture. It has in this regard produced no evidence to contradict Owens' credible and uncontradicted assertion that he would have transferred to Derry had he been given the chance. Respondent's doubts alone cannot serve as a basis for so concluding, nor as grounds for denying Owens backpay. Accordingly, I find, as testified to by Owens, that he indeed would have transferred to Derry in 1988.

The Respondent further contends that Owens did not "genuinely mitigate damages until the fourth quarter of 1988" (RB:52). However, Owens was laid off in the fourth quarter of 1988, and consequently there would have been no reason for him to mitigate damages prior thereto, as suggested by Respondent's above argument. The Respondent may very well have meant to say the fourth quarter of *1989*, not 1988. The argument would, in any event, be without merit, for it is not based on any particular evidence in the record but is instead grounded on speculation and conjecture. Thus, in place of facts showing that Owens did not engage in a diligent job search through the fourth quarter of 1989, the Respondent simply asks that Owens not be credited because it does not believe his account of his job search. While Respondent is free to disbelieve Owens' testimony, its belief alone cannot serve as grounds for denying Owens backpay during that period. As noted, the Respondent does not satisfy its burden of proof by relying solely on its cross-examination of Owens, but must instead affirmatively establish through the production of facts that Owens did not engage in a reasonable job search during that period. As the Respondent has not done so, and as I am convinced Owens testified in a credible manner, I find that Owens indeed engaged in a reasonable search for work from his layoff through at least the fourth quarter of 1989.

I also find without merit Respondent's further contention that Owens' prototype machinist's job with Gilian Company "was equivalent" to his job with U.S. Can and that, consequently, his "net backpay from the second quarter of 1990 through the remainder of his backpay period must be calculated as though he had been making $12 per hour" (RB:53). The Respondent produced no evidence to show that Owens' wages, hours, and working conditions at Gilian were substantially equivalent to that enjoyed by him at U.S. Can. Churchill's Supermarkets, supra. Thus, it has not shown that the "mechanic" duties performed by Owens at U.S. Can were in any way, shape, or form similar to the duties he performed as a "prototype machinist" with Gilian, or that his 30-hour workweek and $15-per-hour wage at Gilian was equivalent to that worked and earned at U.S. Can. In the absence of such evidence, I find that Owens did not incur a willful loss of earnings by quitting his nonequivalent interim job with Gilian. Id.

For all of the above reasons, I find that the Respondent has not satisfied its burden of proving that Owens did not engage in a reasonable job search during the backpay period or that he otherwise incurred a willful loss of earnings by quitting his interim employment. Accordingly, I find that Owens is entitled to backpay in the amount of $37,540., as set forth in attachment 18 of the specification, with interest.

James Paul

Paul was laid off from his rod-man position at the Clearing plant on December 18, 1987, at age 51. No backpay is imputed to him as he admits he failed to look for work following his layoff. He testified, however, that had he been allowed to transfer to one of Respondent's other facilities, including Burns Harbor, at any time following his layoff he would have done so, and would have worked until he reached age 62 (VII:1408). Amended attachment 19 of the Specification imputes to Paul a vacancy created by the retirement of discriminatee John Wallace (see below) on July 28, 1993 (JX-2). His backpay period is alleged to be a continuing one running from July 28, 1993, until such time as the Respondent makes him a valid offer of reinstatement. Thus, while not claiming backpay for Paul, the General Counsel nevertheless contends he is entitled to additional pension service for his entire backpay period.

The Respondent does not dispute that Paul would have taken the IPJO transfer to Burns Harbor in July 1993, nor that he is ineligible for backpay (RB:93). However, as with McLaurin, it argues that Paul should not receive additional pension credits because his backpay period also has no "end date." I disagree, for Paul readily admits he would have worked until age 62, or until January 22, 1998.[22] The Respondent having failed to offer him reinstatement at any time prior thereto, Paul's backpay period, as argued by the General Counsel, would have continued to run until such time as an offer was made. However, given Paul's admission that he would have retired on reaching age 62, his backpay period would, I find, have ended with his retirement. Accordingly, I find that Paul must be credited with additional pension service for the period July 28, 1993, through his retirement date January 22, 1998.

Mable Pearson

Pearson was laid off from her Packing Department group leader position at the Clearing plant on December 18, 1987, at age 57, after which she registered for work with the State unemployment office and began receiving State unemployment benefits, and SUB pay from Respondent. When her SUB benefits ran out in January 1989, Pearson began receiving pension benefits. Pearson testified that she began looking for work immediately following her layoff by asking friends and family members for job leads, searching through the help want ads in local newspapers, and by personally going out and applying at different places, and that she averaged approximately three job contacts per week. She claims she engaged in the above job search through at least February, 1, 1993, when she finally retired.[23] In early 1993, Pearson did find full-time night-shift

[22] As Paul's date of birth is January 22, 1936 (VII:1406; JX-2), he would have turned 62 on January 22, 1998.

[23] Pearson's claim that she searched steadily for work from the day she was laid off to the day she retired is not wholly accurate, for in an affidavit to the Board (RX-37), Pearson stated she did not look for work between the time her unemployment compensation stopped sometime in June 1988, and January 1989, when her SUB benefits expired and she was placed on a pension. From her demeanor, I am convinced Pearson was simply mistaken in her response to the General Counsel that she had looked for work from her "last day of work in 1987, through the time [she] turned 62 in 1993" (V:851), and was not deliberately attempting to mislead. Nor does this affect her backpay amounts for said amounts are computed from April 1989 through February 1993

work at a plastics factory through "Just Jobs," an employment referral service, earning $5 per hour. However, she left after 4 weeks to take what she described as a better position with the Chicago Board of Education working part-time as a school lunchroom attendant, but earning $7.09 per hour. She remained at the Board of Education until 1996.

Pearson gave several reasons for leaving the factory job, including the fact that unlike her dayshift pre-layoff position at the Clearing plant, the factory job was night-shift work, and involved a commute by personal car and company-mandated bus ride of almost one and one-half hours each way. The return trip home, Pearson explained, was particularly dangerous because she was being dropped off at her car at around 1a.m., and forced to drive home alone. By contrast, her Board of Education job allowed her to drive to work, a commute of less than one-half hour. Further, the Board of Education job was day work, unlike the factory job, and provided her with vision and dental benefits, which "Just Jobs" apparently did not provide.

Pearson testified that had she been afforded an opportunity to transfer to one of Respondent's other facilities, including Burns Harbor, following her layoff, she would have done so, and would have worked until she reached age 62. In October 1994, Pearson provided the General Counsel with search forms listing some of employers she contacted during the backpay period. However, because she only listed the ones she was able to recall in 1994, the search forms do not include all her job contacts (V:854). The specification imputes to Pearson a vacancy filled by new hire representative employee, A. Mostello, at Burns Harbor on April 16, 1989, and alleges that her backpay period runs from that date to February 1, 1993, Pearson's admitted retirement date (attachment 20).

The Respondent disputes Pearson's assertion that she would have transferred to Burns Harbor but offers no facts to support its position. It argues instead that Pearson left her full-time factory position job with "Just Jobs" to take the part-time Board of Education job because she only needed additiona money to supplement the pension she began receiving in January 1989. Thus, it contends that since Pearson was only interested in part-time work, she obviously would not have transferred to Burns Harbor to take on a full-time position. Again, the Respondent indulges in speculation, for Pearson never testified that she was looking for part-time work when she applied for employment with the Board of Education. Rather, she took the part-time Board of Education job because it was less onerous than the factory job in that it allowed her to workdays, was a shorter distance to and from her home, and offered fringe benefits not offered at the factory job. Thus, there is simply no evidence to support Respondent's claim that Pearson was not interested full-time employment or that she would have declined an offer to work at Burns Harbor had it been made to her. Pearson credibly averred in this regard that she would have left her part-time Board of Education position to take a better job Burns Harbor. That Pearson may not have asked the Board of Education for additional work hours is hardly proof that she was not interested in full-time work, for she explained that she never asked because she knew the Board of Education had no more hours to give her.

(attachment 20). Footnote 1 of attachment 20, it should be noted, erroneously states that Pearson's backpay begins in the second quarter of 1988.

In furtherance of its "propensity" defense, the Respondent also argues that Pearson would not have wanted to drive the distance from her home to the Burns Harbor plant. Pearson, however, never made such a claim, and indeed was never asked by Respondent if she would have done so. Rather, her testimony in this regard is that had she been allowed to transfer to Burns Harbor, she "really didn't have to drive every night" because she had a friend in the vicinity of the Burns Harbor facility with whom she could have stayed. That Respondent chooses not to believe Pearson is clearly within its prerogative, but its doubts in this regard do not suffice to establish that Pearson would not have transferred to Burns Harbor had she been given that opportunity, much less to deny her backpay. Rather, as oft-repeated here, its burden is one of producing facts to support its argument. Having failed to do so, Pearson's assertions remain intact. I therefore credit Pearson and find that she would have transferred to Burns Harbor following her layoff had she been afforded that opportunity.

I also find no merit in Respondent's claim that Pearson engaged in a willful loss of earnings by leaving her full-time job at the plastics factory to work part-time as a cafeteria attendant with the Chicago Board of Education. As previously indicated (Camardo discussion, supra), the quitting of non-equivalent interim employment does not constitute a willful loss of earnings especially where, as here, the factory job in question posed a hardship for Pearson. *Churchill's Supermarkets*, supra. Nor did she engage in a willful loss of earnings by not looking for a full-time work after obtaining her part-time job with the Board of Education. *Lundy Packing,* supra (see Eardley discussion supra). As the Respondent has produced no evidence to show that Pearson failed to diligently look for work, or that she engaged in a willful loss of earnings during her backpay period, Pearson is entitled to backpay in the amount of $94,328, as shown in attachment 20 of the specification, with interest.

Eugene Peretti

Peretti was laid off from his press feeder position at the Clearing plant on December 18, 1987, at age 49, after which he collected State unemployment benefits, as well as SUB pay from Respondent. When his SUB benefits ran out, Peretti began receiving pension benefits. Peretti testified that he would have taken an IPJO transfer to any of Respondent's other facilities, including the Derry plant following his layoff. The Specification imputes to him a vacancy at the Derry facility filled by new hire representative R. Dionne on January 25, 1988. It alleges that Peretti's backpay period runs from that date until January 27, 1992, when Dionne was terminated and at which point there were no other less senior new hire employees that Peretti could have bumped (attachment 21). In late 1994, Peretti completed Search for Work forms listing some of the employers he contacted during the backpay period in his attempt to find work (GCX-9). The forms, however, do not show all the places he contacted as in 1994, he simply could not recall the names of all the employers he contacted almost five years earlier (III:516). Peretti testified he searched for work by looking through newspaper want ads, word-of-mouth job leads, and by personally going to different places and inquiring about the available of work, and claims to have filled out three to four applications per week (III:480).

The Respondent disputes Peretti's claim that he would have transferred to Derry, noting that in his questionnaire Peretti only checked off the box indicating he would have gone to

Burns Harbor, but did not check off either the Derry or Passaic boxes. Peretti, however, explained that in 1992, he received a letter from Respondent's counsel advising of a job opening at the Burns Harbor facility. Peretti did not get the job, and approximately 2 weeks later, was notified that a janitor's position was available at Burns Harbor, which he declined to accept. He testified that when he received the questionnaire from Standish in 1994, he mistakenly believed, given the two prior Burns Harbor job offers proffered to him by Respondent, that he was again being asked to apply for a position at Burns Harbor, and was not being offered a job at either the Derry and Passaic plants. It was his mistaken belief in this regard, and not any reluctance to transfer to the Derry or Passaic plants, which led him not to check off the Derry and Passaic boxes on the questionnaire. Peretti was a convincing witness who, I find, testified truthfully. Accordingly, I credit his above explanation, and find that had he been given the opportunity to transfer to any of Respondent's other facilities following his layoff, he would have done so. Respondent's further belief that Peretti would not have transferred because it meant he would have to give up his SUB pay and his wife would have to give up her job is rejected as pure speculation and conjecture.

As to Peretti's mitigation efforts, the Respondent admits that Peretti mitigated damages from the second quarter of 1989 through the first quarter of 1991 (RB:67). It contends, however, that because Peretti was receiving SUB pay during 1988 and the first quarter of 1989, he only engaged in a minimal and perfunctory job search during that period, designed solely to qualify for unemployment compensation. In support thereof, it points to his 1988 search form wherein Peretti recorded that all the employers he contacted were "not hiring." It argues that if Peretti had truly been looking for work, "he would have contacted at least some employers with openings" (RB:68). The Respondent, however, never questioned Peretti on what the "not hiring" notations meant. It may very well be that Peretti indeed contacted employers that were hiring but for one reason or another declined to offer him a job, and that Peretti interpreted this to mean that the employer was not hiring. Consequently, I decline to infer from such notations that Peretti did not engage in a diligent job search during the period in question. Further, any doubts in this regard must, as previously noted, be resolved against the Respondent as the wrongdoer, and in favor of the wronged individual, Peretti.

The Respondent further contends that Peretti did not search for work in the first quarter of 1989, because his 1989 search form contains no entries for that period, and further reflects that during that quarter he received some vacation pay and a retirement allowance. The fact that Peretti may have received such benefits during the first quarter of 1989, and that he did not list any contacts for that quarter, does not without more establish that Peretti did not search for work during that period. Peretti testified, without contradiction and, in my view, credibly, that he looked for work throughout his entire backpay period, which would include the first quarter of 1989, and that his search forms do not reflect all contacts made by him (III:479). The Respondent never questioned Peretti on his first quarter 1989 search efforts, and simply made reference to the benefits Peretti received during that period. Thus, it has not shown that Peretti did not look for work during the first quarter of 1989, or for that matter at any time during his backpay period. Accordingly, Peretti is entitled to backpay in the amount of $93,836, as set forth in Attachment 21 of the compliance specification, with interest.

Joseph Pfeil

Pfeil was laid off from his line maintainer position at the Passaic facility on September 24, 1988 (IX:1708), after which he registered with the New Jersey State Unemployment Commission and collected State unemployment benefits, along with SUB pay from Respondent. In January 1990, Pfeil began receiving a pension from Respondent, presumably after his SUB benefits had expired. As per his testimony, Pfeil began looking for work soon after being laid off, and continued doing so until April 1989, at which point he stopped looking because he was having no success. He claims he was required by his local unemployment office to search for work 5 times a week, but that he in fact averaged anywhere from 8 to 10 job contacts per week. The specification imputes to him a vacancy filled by new hire representative Harley Mason at the Derry facility on October 3, 1988. His backpay period is alleged to run from October 3, 1988, to April 1, 1989, at which point Pfeil incurred a willful loss of earnings by removing himself from the job market.

The Respondent disputes Pfeil's claim that he would have transferred to the Derry plant within 2 weeks of his layoff from the Passaic plant but offers no evidence to support its position. Rather, the Respondent simply posits that it is not reasonable to believe that Pfeil would have moved himself, his wife, and two daughters from a house they lived in for 20 years to take a job in Derry, New Hampshire, particularly since he could just as easily have remained unemployed and collected SUB and unemployment compensation which paid him approximately 70 percent of his prelayoff earnings. Regardless of what Respondent may want to believe, the fact remains that Pfeil testified without contradiction that he would have accepted such a transfer. Although it bears the burden of proving facts to establish a reduction or elimination of backpay by, inter alia, showing that Pfeil would not have transferred, the Respondent has not done so. Instead, it suggests that I accept its claim, without proof, that Pfeil had no interest in working and preferred to remain unemployed. There is simply no factual basis to support such an assumption. Accordingly, Pfeil's assertion that he would have accepted a transfer remains unrefuted. Accordingly, and as I found Pfeil to be a believable witness, I credit his testimony and find he indeed would have accepted a transfer to the Derry plant in October 1988. The Respondent raises no mitigation issue with respect to Pfeil, admitting on brief that the latter made reasonable efforts to mitigate his damages during his backpay period. Accordingly, I find that Pfeil is entitled to backpay in the amount of $14,036, as alleged in attachment 22 of the specification, with interest.

Earnest Powe

Powe was laid off on February 10, 1989, from his fork lift driver position at the Clearing plant, at age 57, after which he registered for work with the Illinois State Unemployment Office and began receiving unemployment compensation. He also collected SUB pay for a year, after which he began receiving a pension. Powe testified he began looking for work soon after being laid off, and did so by going through the help wanted ads in a local newspaper, and by driving around and stopping at different locations to inquire of employers if they were hiring, and on occasion was permitted to fill out a job application. Powe had no success in finding work during his backpay period

despite contacting some two to three employers per week. He testified, without contradiction, that he would have been willing to transfer to another of Respondent's facilities, including the Derry plant, following his layoff, had he been given the opportunity. The Specification imputes to him a vacancy filled by new hire representative employee, J. Noiles, at the Derry plant on March 6, 1989, and alleges that his backpay period runs from that date to January 27, 1991, when Noiles was terminated and there was no other less senior new hire representative that Powe could have bumped (attachment 23).

Notwithstanding Powe's above-undisputed claims, the Respondent argues that Powe would not have transferred to Derry following his layoff because he had lived in the Chicago for 50 years, had a disabled wife, had his children and grandchildren living with him, and would have to give up his SUB and pension benefits. Yet, it offers no facts to support its contention, and attempts instead to discredit Powe through supposition and conjecture. Respondent's above assertion is therefore nothing more than an expression of opinion on how it believes Powe, given his family and financial circumstances, would have reacted if given an opportunity to transfer. Its belief in this regard, however, does not constitute proof that Powe would have declined a transfer to Derry, or for that matter to any other facility, or serve as grounds for denying him backpay.

Respondent's further suggestion on brief that Powe would have had to give up his pension benefits had he transferred to Derry in March 1989, is nothing short of absurd as Powe did not begin receiving a pension until early 1990, e.g., 1 year after being laid off or ten months after March, 1989. Powe did receive SUB pay as well as unemployment benefits during 1989, totally some $19,000 (RX-9), and admittedly would have had to give up such benefits had he accepted an IPJO transfer in March 1989. While Respondent produced no evidence to show what Powe's salary might have been had he transferred to Derry, it undoubtedly would have far exceeded his 1989 earnings from SUB and unemployment compensation. Thus, using Noile's 1989 four-quarter earnings for comparison (attachment 23), which amounts are being imputed to Powe, the latter's 1989, earnings from such a transfer would have been approximately $28,000, or about $9,000 more than his total earnings from SUB and unemployment benefits. Such an increase in earnings could reasonably have served as a strong inducement for Powe to take the transfer to Derry. Further, contrary to Respondent's assertion, there is no indication in the record that his wife's heart condition was such that she was immobile or would be adversely affected by such a move. As stated, any suggestion by Respondent to the contrary is sheer speculation and insufficient to support a finding that Powe would not have moved.

The Respondent further claims that Powe failed to mitigate his damages. Thus, it argues that the random manner in which Powe looked for work, and his inability to find work through such means, would have convinced any reasonable person to refocus his efforts, and that Powe's failure alter his job searching methods was unreasonable and justifies denying him backpay. It also points out that Powe only made two to three job contacts per week, less than what was needed to receive unemployment compensation, and that this further serves to establish that Powe did not engage in a reasonable job search during the backpay period. I disagree.

The Respondent references only part of Powe's testimony to support its claim that his job search was random and unreasonable, and conveniently ignores his further assertion that he registered for work with the Illinois State Unemployment Commission, and also reviewed help wanted ads in the Chicago Sun Times newspaper in his continued efforts to find work, all of which proved unsuccessful. Thus, contrary to Respondent's assertion, Powe's efforts at finding work was not limited to random visits to employers. Further, prior to his layoff, Powe had been in Respondent's employ for some 37 years, and presumably would have little or no experience in job searching techniques. This would reasonably explain his random-style manner of looking for work. Thus, I see no reason to deny Powe backpay simply because he may not have used the most appropriate job searching method. From his description of his job searches, which the Respondent has not refuted, I am convinced that Powe diligently searched for work throughout the backpay period. That Respondent may believe Powe could have done more or something else to obtain work is of no consequence, for the standard to which an employee's search-for-work efforts are held is one of reasonable diligence, not the highest diligence. *Black Magic Resources*, 317 NLRB 721 (1995).

I also find without merit Respondent's claim that Powe's testimony about having contacted two to three employers per week means his job search failed to meet even the State's minimum requirements for receiving unemployment compensation and is evidence that he did not diligently look for work. Powe's testimony as to the number of employer contacts made in a week's time was, in my view, nothing more than an estimation. Morever, the fact that Powe received unemployment benefits is strong evidence that he indeed satisfied the State's requirements for unemployment compensation. While the fact that Powe registered with the State unemployment office and received benefits does not, by itself, establish that he diligently searched for work, it nevertheless is a factor that weighs heavily in his favor, and supports a finding that Powe did engage in a reasonable job search. Here, however, Powe's job search was not limited solely to visiting the State unemployment office. Rather, his testimony, which has not been contradicted, and which I credit, shows that he personally visited employers, and perused newspaper ads in an effort to find work. In these circumstances, and as the Respondent has produced no evidence to the contrary, I find that Powe did engage in a reasonable job search throughout his backpay period.

Finally, the Respondent notes that a 1990 search form purportedly returned by Powe to Board agent Standish contains a statement indicating that Powe did not search for work during all of 1990 (see, GCX-6, back of last page). From this it contends that Powe is not eligible for backpay for all of 1990. I disagree. First, the 1990 search form in question, herein referred as form #1, is inconsistent with another 1990 search form, herein form #2, which contains no such statement about Powe being retired and indeed reflects that Powe was in fact still searching for work throughout all of 1990 (GCX-6, p. 5). While there may be a perfectly logical explanation for the apparent inconsistencies between form #1 and form #2, no such explanation was sought from Powe by either party. However, Powe's sworn testimony at the hearing that he searched for work throughout his entire backpay period, including all of 1990 (II:330), accords with search form #2 which shows many of his 1990 job contacts. Thus, when taken together with his sworn testimony, I am convinced that form #2, and not form #1, accurately represents Powe's activity during 1990. While

form #1 may create some doubts as to the precise nature of Powe's activity during 1990, any such doubt or ambiguity must be resolved against Respondent, as wrongdoer, and in favor of Powe, the injured party. Teamsters Local 469 (Coastal Tank Lines), supra. As the Respondent has not shown that Powe failed to diligently look for work or engaged in a willful loss of earnings, I find that Powe is entitled to backpay in the amount of $69,767., as set forth in attachment 23 of the specification, with interest.

Helen Rae

Rae was laid off from her packer position at Respondent's North Grand plant on October 23, 1987, at age 54. As per her testimony, Rae, following her layoff, began searching for work by asking friends for job leads, searching newspaper want ads, and simply driving around to different locations. Her job search continued through at least June 30, 1991, averaging from 6 to 10 contacts per week, after which she stopped looking for work (III:534–535, 540). In late 1994, she filled out and returned to Board Agent Standish Search for Work forms in which she set forth, to the best of her recollection, the places she contacted in her efforts to find work. She testified, however, that not all the places she visited are shown on the forms because she could not recall all the contacts made given the passage of several years since her job search. Rae claims that after filling out the search forms, she discarded the records she had kept of her job search. The record reflects that after Standish sent her a letter asking her to be more precise in her responses (RX-18), Rae, who by then had discarded her job search records, notified Standish of this fact (GCX-16), but nevertheless attempted to identify the employers she may have contacted by driving through the various areas where she had searched for work. After reconstructing her job search as best she could using this latter method, Rae completed the search forms and returned them to Standish.

Rae also registered with the Illinois State Unemployment Office following her layoff and received unemployment compensation, along with SUB pay from Respondent. When her SUB benefits expired in late 1988, Rae began receiving pension benefits. Rae indicated in the 1994 questionnaire, and again at the hearing, that she would have taken an IPJO transfer to one of Respondent's other facilities, including Burns Harbor, following her layoff, and worked until she reached age 62. The specification imputes to her a vacancy at the Burns Harbor facility filled on October 26, 1987, by new hire representative employee, James Mayfield, and alleges that her backpay runs from the fourth quarter of 1987, e.g., October 26, 1987, to June 30, 1991, when Rae admittedly removed herself from the job market (attachment 24).[24]

On the "propensity" issue, the Respondent offers no evidence to refute Rae's assertion that she would have gone to Burns Harbor had she been allowed, and simply asks that Rae not be credited because it believes Rae would not have wanted to make the "very long and difficult" commute to Burns Harbor, and because given the SUB payments she began receiving soon after her layoff, and pension benefits she would eventually receive, Rae had no real economic incentive to take such a transfer. I disagree. First, Respondent never asked Rae whether the distance from her home to the Burns Harbor plant would have prevented her from accepting a such a transfer to that facility. Nor indeed was it made clear on the record just how far of a commute it would have been for Rae. Thus, the Respondent's suggestion that Rae would not have wanted to commute is based on pure speculation.

Just as speculative is Respondent's further suggestion that Rae's SUB and pension benefits were economic disincentives for such a transfer. It is highly unlikely, for example, that Rae would have been receiving SUB benefits on October 26, just three days after her October 23, layoff, when the position being imputed to her at Burns Harbor became available.[25] Rae certainly was not receiving any pension benefits as her pension did not kick in until late 1988, after her SUB benefits ran out. Thus, it is simply ludicrous for Respondent to suggest that Rae's SUB and pension benefits would have served as economic inducements for her not to transfer to Burns Harbor on October 26, 1987, when she had yet to receive any such benefits as of that date. Indeed, when one compares the amount of SUB benefits Rae received during all four quarters of 1988, totaling some $10,000 (JX-3), with the more than $30,000 in expected earnings during the same four quarters of 1988, had she taken the IPJO transfer, as reflected by the gross earnings being imputed to her in attachment 24, it would have made very little sense for Rae not to have transferred. Thus, is Respondent's argument which makes little sense, for a transfer to Burns Harbor with the opportunity to increase her earnings three-fold over what she stood to receive in SUB and unemployment benefits, in my view, was a strong inducement for Rae to accept a transfer. In sum, Respondent's entire argument in this regard constitutes nothing more than supposition and conjecture, and cannot serve as a basis for concluding that Rae would not have transferred to Burns Harbor following her layoff or for denying her backpay. Rae's assertions as to her willingness to transfer to Burns Harbor immediately following her layoff therefore remain undisputed and are credited.

The Respondent also questions Rae's credibility regarding her attempts to mitigate her damages but, as with its propensity argument, offers nothing in the way of proof to substantiate its claim that Rae did not mitigate damages. Thus, it simply does not believe that Rae was able to reconstruct her search efforts after discarding her own records. I found Rae's explanation, that she drove to the various locations in an attempt to recall where she might have sought work, convincing. From my observation of her demeanor, Rae struck me as having testified in an honest and truthful manner. Accordingly, I credit her above testimony.

The Respondent also finds it difficult to believe that all of the employers contacted by Rae during her 4-year job search were "not hiring," as Rae reflected in her search forms. Contrary to Respondent, I do not find it all that implausible that Rae would have been told by the various employers she visited that they were not hiring, for it may very well be that no hiring was taking place, or that, if hiring, Rae was simply being told this to prevent her from applying because of her advancing age. The Respondent, it should be noted, never questioned Rae on the "not hiring" entries.

Finally, the Respondent argues that Rae is not entitled to backpay for the first quarters of 1989, 1990, and 1991, because

[24] Attachment 24 inadvertently states, at fn. 1, that Rae's backpay period begins in the first quarter of 1988.

[25] In fact, JX-3, which purports to show the amount of SUB pay received by each discriminatee by quarters during their backpay period, shows no SUB pay for Rae prior to the first quarter of 1988.

she readily admits being on vacation during January and February of those years, and consequently not looking for work. I disagree. Under the Master Agreement to which the Respondent, as found by the Board in the underlying decision, was bound, Rae, given her more than 25 years of service with Respondent, was eligible for a minimum of 5 weeks of paid vacation a year, although Rae asserts that every 5 years she received 13 weeks (RX-12, p. 43; III:539). Rae testified that she regularly took her vacation about the same time and went to a home she and her husband had in Florida. Thus, had Rae not been laid off, and instead been allowed to transfer to Burns Harbor, as she credibly stated she would, it is reasonable to assume she would have continued to receive her vacation benefits. The Respondent does not contend otherwise. As vacation benefits are normally included in backpay, it follows that the periods for which Rae was on vacation during the first quarters of 1989, 1990, and 1991, should not be excluded from backpay. *Iron Workers Local 15*, 298 NLRB 445 (1990). The Respondent having failed to show that Rae did not engage in a reasonable job search at any point in her backpay period, or otherwise engaged in a willful loss of earnings, I conclude that she is entitled to backpay in the amount of $117,436, as alleged in attachment 24 of the specification, with interest.

Smith Teemer

Teemer was laid off from his lithographic pressman's job at the Clearing plant on October 1, 1988, at age 57. The specification does not ascribe any backpay to Teemer because of his failure to mitigate damages following his layoff. Teemer, however, testified that had he been allowed to take an IPJO transfer to one of Respondent's other facilities, including the Burns Harbor plant, following his layoff, he would have done so, and would have worked until June 1986, when he turned 65. He reaffirmed this at the hearing when, in response to Respondent's query of whether he still had an interest in "going to work anywhere," Teemer responded, "No, I'm not interested" (VII:1379). Amended attachment 25 of the specification (GCX-2) imputes to Teemer new hire representative employee B. Cullimore's position at Burns Harbor which would have become available following the retirement of discriminatee Hawkins on October 21, 1991 (see attachment 11). It alleges that Teemer's backpay period runs from that date until such time as he receives a valid offer of reinstatement. Thus, while conceding that Teemer is not entitled to backpay because he failed to mitigate damages, the General Counsel nevertheless contends that as a discriminatee, Teemer remains eligible for additional pension credits for his period of backpay.

The Respondent questions Teemer's claim about wanting to transfer following the layoff, but offers nothing more than disbelief as support for its position. It claims, for example, that Teemer cannot be believed when he states that he was willing to give up his pension benefits to take an IPJO transfer. However, Teemer credibly explained that he would have done so because his earnings from working would have been more than the pension benefits he was receiving. The Respondent nevertheless argues that had Teemer searched and found employment elsewhere, he could have continued receiving his pension, an option he would not have had if he returned to work for Respondent. It suggests that Teemer's failure to look for work simply means that he wanted to keep his pension and had no interest in working at one of its other facilities. However, Teemer's failure to look for work elsewhere does not necessarily lead to the conclusion that he would not have wanted to remain working for Respondent at one of its other facilities. Teemer credibly explained that by remaining with Respondent, he would have added to his years of service which in turn translated to a larger pension when he finally retired under normal circumstances. As the Respondent has not produced any facts to support its theory that Teemer would not have transferred to Burns Harbor in the third quarter of 1991, I accept as true Teemer's claims in this regard.

As it did with McLaurin and Paul, the Respondent contends that Teemer is not eligible for any additional pension credits. Its contention is without merit, for while not eligible for backpay because of his failure to look for work, Teemer remains a discriminatee entitled to be made whole for all losses he may have suffered due Respondent's unlawful conduct, including the additional pension credits he would have received by taking an IPJO transfer to Burns Harbor but for Respondent's unlawful conduct. Having found that Teemer would have accepted a transfer in October 1991, to Burns Harbor, it stands to reason that he would have again begun to receive pension credits from that point until he left Respondent's employ, which by Teemer's admission would have occurred on June 18, 1996, when he turned 65 and retired. Accordingly, I find that while not entitled to backpay, Teemer must be credited with additional pension service from October 21, 1991 to June 18, 1996.

John Wallace

Wallace was laid off at age 59 from his Maintainer and Truck Driver's job at the North Grand plant on September 4, 1987. Following his layoff, Wallace began receiving unemployment compensation as well as SUB pay. When his SUB pay ran out in about a year, Wallace began receiving a pension. He testified that he began looking for work soon after being laid off and that, as required by the State Unemployment Office, contacted at least three employers per week, and at times made 7-8 contacts per week, in an effort to find employment (II:270).

In October 1994, Wallace filled out and returned to Board Agent Standish Search for Work forms showing some of the employers he contacted during his backpay period, admitting at the hearing that he only listed what he was able to recall some nine years after the fact, and that "there were a lot more probably, but I didn't put them down" due to the lack of recall (II:316). He testified that had he been allowed to take an IPJO transfer to another facility, including Burns Harbor, following his layoff, he would have done so, and would have worked another 6 years, e.g., until age 65. The Respondent concedes that Wallace would have taken an IPJO transfer to Burns Harbor in September 1987 (RB:90). The specification imputes to Wallace the position filled by new hire representative D. Martin at Burns Harbor on September 27, 1987, and alleges that his backpay period runs from that date to November 1, 1988, when Wallace removed himself from the job market, thereby incurring a willful loss of earnings (attachment 26).

The Respondent contends that Wallace "completely failed to mitigate his damages," citing as support the fact that Wallace only listed 12 employer contacts in a 4-1/2 month period on his 1987 search form. It further argues that Wallace's search form is not reliable because it reflects that the job contacts were made prior to 1987, while Wallace was still in Respondent's employ. Finally, the Respondent claims that Wallace had little

economic incentive to seriously look for work because Wallace knew he would lose his SUB and unemployment benefits, and because those benefits coupled with his wife's earnings as a schoolteacher made for a "healthy" lifestyle (RB:91). Respondent's above contentions are without merit.

Initially, there is no doubting that when Wallace filled out the Search for Work forms in 1994, he mistakenly inserted in the first three quarters of the 1987 form the names of employers he must have contacted following his September 1987 layoff. Wallace admitted as much at the hearing when he agreed, in response to a question by Respondent's counsel, that his search form was wrong to the extent it reflects he was looking for work prior to his layoff, and attributed the error to the fact that he was being asked to fill out the form some seven years after such contacts were made (II:307). Despite minor flaws in his testimony, I found Wallace to be a generally credible witness and am convinced he testified in an honest and truthful manner. Thus, I find that the entries erroneously shown for the first three quarters of 1987, while he was still employed, actually reflect job contacts made by him after he was laid off.

Wallace's further testimony that he was unable to recall in 1994, the number of contacts made during his backpay period some seven years earlier, and that he listed only those he was able to recall, reasonably explains why only 12 employers are shown in his search form. Wallace, as noted, testified that his job search at times included some 7–8 contacts a week, but never less than three per week as required by the State unemployment office. His testimony in this regard was uncontradicted. Moreover, it is reasonable to assume that had Wallace not complied with the State requirements of three contacts per week, his unemployment benefits would in all likelihood have been suspended or terminated. The Respondent makes no such claim here, nor in any event is there evidence to support such an assertion. Finally, Respondent's claim as to Wallace's lack of economic motivation for finding suitable interim employment is at best speculative and cannot serve as a basis for denying backpay to Wallace.

In sum, I am convinced from Wallace's credited testimony that he diligently searched for work during the backpay period. The Respondent, who bears the burden of establishing by a preponderance of credible evidence that Wallace engaged in a willful loss of earnings and is therefore not entitled to some or all of the backpay being claimed, clearly has not done so here. Accordingly, I find that Wallace is entitled to backpay in the amount of $41,596, as set forth in attachment 26 of the specification, with interest.

Alex Baugh

Baugh was laid off December 18, 1987, from his line maintainer position at the Clearing plant, at age 46, and rehired in 1992, at the Burns Harbor facility (V:920–921). Following his layoff, Baugh began receiving SUB pay, as well as benefits from the State Unemployment Service. Baugh testified that soon after being laid off, he began looking for work, and did so by daily reviewing want ads in local newspapers, asking friends and relatives for job leads, and simply driving around to different job locations and inquiring about jobs. He claims he averaged anywhere from 12–20 job contacts per week. In late 1994, Baugh filled out and returned Search for Work forms furnished to him by Board Agent Standish setting forth therein the names of some of the employers he contacted during his search for work, but admitted that due to the passage of time he was unable to recall all the contacts made, and that the forms therefore do not contain a complete list of employers he may have contacted.

Baugh testified that had he been allowed to take an IPJO transfer to any of Respondent's other facilities, including the Derry plant, when laid off in December 1987, he would have done so. He admits, however, that just prior to his layoff, Respondent offered him and three other individuals similar jobs at its Elgin plant, but that he declined to accept the offer because he believed the facility was nonunion, and because he would not be receiving the same compensation package he was getting at the Clearing plant. Although he claims that the Elgin plant was also too far, he emphasized that the major reason for refusing the transfer was because the benefits package was not attractive to him (V:967–968). Despite his reluctance prior to his layoff to accept employment at Elgin, Baugh nevertheless accepted a consulting position at Elgin some 2 months later and remained there for some 2 months, at the end of which he was informed his services were no longer needed (V:933, 935, 937).

The specification imputes to him the vacancy filled by new hire representative employee R. Jenkerson on June 27, 1988, at the Derry plant. It further alleges that following Jenkerson's termination on March 26, 1989, Baugh would have bumped into the position held by less senior new hire employee, D. Stultz, at Derry, and that Baugh's backpay period runs from June 27, 1988, to January 6, 1991, when Stultz was terminated, and at which point there was no other less senior new hire employee that Baugh could have bumped (Attachment 27).

The Respondent contends that given Baugh's reluctance prior to his layoff to accept a transfer to the Elgin facility, it is reasonable to assume, notwithstanding Baugh's claim to the contrary, that he would not have accepted a transfer to the Derry plant had it been offered to him, inasmuch as the Derry plant was further away than the Elgin plant, and any compensation package received as an entry-level employee at Derry would have been less than what he had been receiving at the Clearing plant (RB:56). It further argues that it would have made little economic sense for Baugh to take an IPJO transfer following his layoff as he stood to lose the SUB benefits he would be receiving for at least 2 years, and because it meant his wife would have to give up her $23,000 a year nursing job with a local hospital. Respondent's arguments are unpersuasive.

Regarding his rejection of a transfer to the Elgin plant, the record makes clear that that offer was made to Baugh sometime prior to his layoff, exactly when is not known. However, no such offer to Elgin, or for that matter to any other facility, was ever made to Baugh by Respondent following his layoff. The Respondent therefore could not have known if Baugh, when confronted with his permanent layoff on December 18, 1987, from a job he had held for nineteen years, might have changed his mind and viewed the transfer to Elgin, Derry, or Passaic plant as less objectionable than the alternative of being unemployed. Thus, it cannot be said with any degree of certainty that Baugh's refusal to transfer to Elgin prior to his layoff meant he would not have accepted a job at that or some other facility following his layoff. Indeed, Baugh's uncontroverted testimony regarding his consulting work at Elgin some 2 months later tends to support the view that following his layoff Baugh set aside any objections he may have had to working at Elgin in order to renew his employment relationship with Respondent. As noted, it was the Respondent, not Baugh, who terminated that relationship when it advised him his services

were no longer needed. The Respondent, who presumably would have a record of his consulting work, produced no evidence to refute Baugh's above claim.

Further, its contention that it made no economic sense for Baugh to relocate to Derry or Passaic because he would lose his SUB pay and his wife would be forced to give up her job is mere speculation and devoid of factual support. In fact, Respondent's own posthearing brief reflects that Baugh's earnings from such a transfer would have been several thousand dollars more than what he was receiving in SUB pay, a factor that, notwithstanding Respondent's assertion to contrary, could reasonably have served as an inducement for Baugh to accept such a transfer had it been presented to him (RB:56–57). However, Baugh, like all the other named discriminatees, never had the opportunity to weigh the pros and cons of accepting such a transfer as the option of transferring under IPJO to such facilities following his layoff was no longer available. Thus, any suggestion by Respondent that Baugh would not have transferred to either Derry or Passaic is, as noted, based on nothing more than supposition and conjecture, and cannot serve as a basis for denying Baugh the backpay which the specification alleges is owed him. Accordingly, I find that Respondent has not satisfied its burden of showing that Baugh should be denied backpay because he would not have transferred to Derry in June 1988, as alleged in the Specification.

Finally, the Respondent's claim that Baugh failed to mitigate his damages is premised on the same arguments discussed above with respect to its "propensity" claim (RB:58). Having rejected said arguments, I find that the Respondent has not met its burden of showing that Baugh is not entitled to some of all of the backpay shown for him in the specification because he failed to diligently search for work during his backpay period or engaged in some willful loss of earnings. Accordingly, I conclude that Baugh is entitled to backpay in the amount of $87,595, as alleged in amended attachment 27 of the specification, with interest. Further, as admitted by Respondent, Baugh is entitled to vacation pay in the amount of $2894, with interest (amended attachment 27 fn. 3).

Calvin Hart

Hart was laid off on December 18, 1987, from his coder operator position at the Clearing plant, at age 51. He began receiving SUB and unemployment benefits following his layoff, and admits that due to a medical condition he did not begin looking for work until January 1989. He also began receiving pension benefits in January 1989. In October 1994, Hart filled out and returned to Standish a questionnaire in which he indicated that had he been allowed to transfer to another facility, including the Derry plant, he would have done so (GCX-33). He also filled out and returned Search for Work forms listing the employers he contacted beginning January 1989. The Specification imputes to Hart a vacancy filled by new hire representative M. Bujold at the Derry plant on January 27, 1988. It does not, however, impute any backpay for him for the first, second, third, and fourth quarter of 1988 because Hart removed himself from the job market during that period, and did not again begin looking for work until January 1, 1989 (attachment 28 fn. 2). Hart's backpay period is alleged to run from January 27, 1988 to January 27, 1991, when Bujold was terminated and there was no other less senior new hire representative that Hart could have bumped. In October 1992, Hart returned to work at the Burns Harbor facility.

The Respondent concedes that Hart mitigated his damages from 1989 through the end of his backpay period, and understandly does not dispute the General Counsel's claim in the Specification that Hart did not look for work during all of 1988. It does dispute Hart's assertion that he would have accepted an IPJO transfer had it been offered to him (RB:62–63). The Respondent, however, presented no evidence to refute Hart's testimony. Rather, it simply argues that it is unlikely that Hart would have wanted to relocate to another facility since he and his wife were living comfortably on his SUB pay and her earnings. Respondent's belief as to what Hart may or may not have done is pure speculation and clearly does not constitute a valid basis for denying Hart backpay.

Respondent does point out that in 1988, Hart was aware that some hiring was going on at its Elgin plant but did not bother to apply, arguing from this that Hart could hardly have been interested in transferring to another facility as he did never bothered to seek work at Elgin. Hart's testimony in this regard, however, is that he was not certain that laid off Clearing workers were being hired at Elgin, and had only heard rumors to that effect. He further noted that he made no effort to find out if the rumor was true as he did not know who at the Elgin plant to call and speak to about any potential jobs (VII:1325). I credit Hart's explanation, and further note that Respondent has not established that jobs were indeed available at the Elgin plant in 1988, or, if they were, that Hart would have been hired at that facility. In sum, the Respondent has not refuted Hart's assertion that he would have transferred, and readily admits that Hart mitigated his damages from January 1989 through January 1991. Accordingly, I find that Hart is entitled to backpay in the amount of $51,915., as alleged in Attachment 28 of the Compliance Specification, with interest. The Specification, as noted, further alleges, the Respondent admits, and I therefore find that Hart is owed vacation pay in the amount of $3408, with interest (attachment 28 fn. 4).

REMEDY

Having determined that the General Counsel has properly identified the discriminatees entitled to remedial relief under the terms of the Board's underlying order in this case, the Respondent shall be directed to make the discriminatees whole by paying them the backpay and/or vacation pay amounts set forth next to their names in the attached appendix, with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further except for discriminatees Jack Boone, Joseph Dauenhauer, Trueman Goodwin, and Carl Smith, who only are owed the vacation pay amounts set forth next to their names, with interest, the Respondent shall be required to credit the discriminatees with additional pension service covering their entire backpay periods.[26]

[26] The record does not make clear how the additional pension credit will affect the pension earnings of those discriminatees who began receiving pensions during their backpay periods, although it is fairly safe to assume it will result in an increase in such pension amounts. Thus, had those discriminatees who were put on a pension soon after their layoff been allowed to continue working by taking an IPJO transfer, they would have earned additional pension service for the time reflected by their backpay periods, and would in turn have been entitled to higher pension benefits. The Board's Order, I find, clearly contemplates making discriminatees whole for the difference between what they actually received in pension benefits following their layoffs, and what they would have received when the additional pension credits they would have earned but for Respondent's unlawful conduct are factored

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, United States Can Company, a Wholly Owned Subsidiary of Inter-American Packaging, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall make the employees named in the attached appendix whole by paying to them the sums set forth next to their names, with interest on such amounts to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and, with the exclusion of Jack Boone, Joseph Dauenhauer, Trueman Goodwin, and Carl Smith, shall credit the employees with pension service covering their backpay periods.

APPENDIX

Discriminatee	Backpay	Vacation Pay
J.G. Battles	$3,362	
Alex Baugh	87,595	$2,894
Robert Bennett	92,876	
Jack Boone		3,644
Alan Byers	94,613	
Patsy Camardo	85,299	
Willie Conner	18,256	
Joseph Dauenhauer		3,602
Anthony Eardley	52,961	
Earnest Finn	62,710	
Dorothy Flowers	24,972	
Trueman Goodwin		2,040
Louise Harris	30,190	
Calvin Hart	51,915	3,408
John Hatfield	79,471	
Frances Hawkins	49,524	
Thomas Husul	55,062	
Boleslaw (Bill) Kmic	24,294	
Eddie Lewis	78,642	3,588
Carl Menhennet	47,004	
John Misiora	66,820	
Gerald Owens	37,540	
Mable Pearson	94,328	
Eugene Peretti	93,336	
John Pfeil	14,036	
Earnest Powe	69,767	
Helen Rae	117,436	
Carl Smith		2,962
John Wallace	41,596	

in. While the General Counsel alleged that discriminatees were entitled to additional pension credits during their backpay periods, the specifics of how this affects the discriminatees' pension earnings was not litigated. In the absence of such information, and having found that the discriminatees are entitled to be made whole for any losses caused by their failure to receive additional pension credits, I find that the discriminatees full entitlement to such benefits must await further computations by the General Counsel. See, e.g., *Teamsters Local 469 (Coastal Tank Lines)*, supra at 12.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.